The Central Law Journal.

ST. LOUIS, AUGUST 3, 1888.

CURRENT EVENTS.

LIBEL — JUSTIFICATION — MITIGATION OF DAMAGES.—The legal profession in England has been much interested in a recent libel case in which the defendant desired to take all the chances to avoid the payment of damages. The defendant had published a charge that the plaintiff, a jockey, had so ridden a horse as to lose, not to win, a certain race, contrary to his duty as a jockey, and to the loss of the backers of hishorse. Upon this cause of action a suit was brought, and defendat pleaded the truth of the charge he had made in justification of it. This line of defense failed, but as the defendant was permitted to give in evidence in mitigation of damages the bad character of the plaintiff, he succeeded in reducing the damages awarded by the jury to the magnificent sum of one farthing. An appellate court before whom the case had been brought, after considering the evidence, arrived at the conclusion that the verdict was correct. They conceded that the standard of moral excellence to be expected of a jocky was not as high as that appertaining to some other avocations, but thought that from the evidence as to his general character, the plaintiff had fallen short of even the *modicum* of work usually expected of his confreres of the "whip and spur." In the case to which we refer,[1] Chief Justice Coleridge presided, and upon a plea of justification, admitted in mitigation of damages evidence of the general character of the plaintiff as to matters connected with his avocation. The law of evidence in libel cases has undergone several material changes. The old rule forbade the truth of the charge embodied in the libel to be given in evidence at all, the rule being, "the greater the truth the greater the libel." Afterward defendants were permitted to plead justification, and sustain the plea by proof that the charge made was true, but this defense not only precluded every other, and if it was not sustained, operated as a republication of the libel, and justified a serious increase of the damages awarded. Now, it seems defendants are permitted to prove, if they can, the truth of the charges they have made, and if they cannot sustain the charge, to prove, by way of mitigation of damages, the bad character of the plaintiff.

The *London Law Journal* protests against this rule as operating unjustly against plaintiffs in libel cases, and giving an undue advantage to the defendant, who is permitted, after having failed to sustain the charge which he has volunteered against the plaintiff, to go into the life and conversation of the latter from his youth upward, and, under the guise of proving his general character, to place before the jury the unsworn testimony of his enemies, personal, social or political.

On this subject, as on most others, there is something to be said on both sides. The publisher of an alleged libel is a volunteer, except in very rare instances, he is bound by no law, duty or obligation to make the publication, and this fact constitutes a very serious aggravation of the wrong. A libel published as if in vindication of public interests, rights or duties, is as indefensible as one published in retaliation for a private grievance, or proceeding from mere wantonness or general malice. The falsehood of the charge is the *gravamen* of the offense, and in the absence of evidence of an honest mistake, one is as reprehensible as the other. On this side it may be said that when one is sued for libel he has his option. If the charge is true, and he is satisfied that he can prove it, he may well plead justification, and "go in and win," if he can, but if he fails he should be precluded from mitigation because, having told a falsehood in print, he has deliberately reiterated it in court, in solemn form and as matter of record.

On the other hand, it may be said that it is hard on a defendant to be mulcted in exemplary damages, because he has been mistaken in his facts or misled by his witnesses, or brought to grief by the perversity of an obstinate jury, and all at the instance and for the benefit of a worthless fellow whose soul, body and estate are not worth a tithe of the damages the jury award him.

The answer to all this is that if your adversary is contemptible you should have let

[1] Woods v. Cox, Law Journal, (Eng).

him alone, unless compelled to act by a sense of duty; that you cannot touch pitch without being defiled; that these are the perils that environ the man that meddles, not with cold iron, but with printer's ink; and that in everything connected with a printing press, no maxim is more worthy of general acceptation and implicit obedience than that attributed to the eccentric Davy Crockett, of Tennesse, "first be sure you are right, then go ahead."

We think the old rule which Lord Coleridge declined to follow is the better rule; that when a defendant in a libel suit has deliberately pleaded that the alleged libel is true, he should be held to prove the affirmation he has made, and be precluded from all aid from collateral or side issues as to the plaintiff's reputation. It is no hardship upon a defendant in such a case to be put to his election, between a plea of justification by which he repeats of record the libel if it is a libel, and a plea of "not guilty," by which although he puts himself technically *in misere-cordia*, to use an ancient phrase, he can avail himself of every defense except the truth of his charge, and may mitigate the damages down to a nominal sum. If he is too proud to avail himself of this line of defense upon these terms, he should be too proud to accept such a defense upon the failure of his plea of justification.

We are aware that some of our States have preceded Lord Coleridge, in adopting the rule he has followed in the case to which we have referred, but we nevertheless think it is progress in the wrong direction. Moreover, we are of opinion that at the very best civil actions for libel and slander afford but an inadequate and imperfect remedy for injuries inflicted by slanderous tongues and venomous pens. In the "good time coming" we think the criminal jurisdiction of the courts will be extended over many forms of libel and slander, which are now so imperfectly ckecked by civil jurisdiction.

NOTES OF RECENT DECISIONS.

ASSESSMENT — CITY IMPROVEMENTS—ABUTTING PROPRIETORS—NOTICE—CONSTITUTIONAL LAW—The court of appeals of Virginia has decided a case,[1] in which they set forth very perspicuously the law governing the current practice of assessing for benefits the property of abutting proprietors to defray in part or altogether, the cost of making street improvements. This system seems to be quite modern but has received the sanction, as to constitutionality and justice of the highest courts of many of the States. The facts were simply that the lot of the plaintiff in error was assessed and he was required to pay one-fourth of the costs of the improvements of the street in front of his lot. He resisted the demand on the ground that the ordinance in question contravened the fourteenth amendment of the constitution of the United States, in this that it provided no day in court so that the party assessed could appear and contest the assessment, and that he had no notice to do so. The court, however, held otherwise, saying:

LACY, J: "As we have seen, the assessment is expressly authorized by the legislature in the seventh section of the charter. That the legislature had the power to authorize these assessments is settled.[2] When this work was done the cost was estimated per foot. Under the general ordinance the city bore one-half, and each lot-owner on either side one-fourth, and the share of the plaintiff was thus ascertained to be $99, her front being 120 feet. This regular proceeding was reported duly and regularly to the council, and then approved. No complaint was ever made to the council by any person that anything was done irregularly or erroneously, while the work progressed, for months, under the provisions of the general public law known to all.

It is claimed that the fourteenth amendment to the constitution of the United States invalidates the ordinance, and everything which has been done under it, because the ordinance does not provide that the owners shall be served with notice of the assessment and given a time and a place to show cause against it. There are decisions cited by the learned

[1] Davis v. City of Lynchburg, Va. Ct. App., May 3, 1888; 25 Reporter, 569, 6 S. E. Rep. 230.
[2] Norforlk v. Ellis, 26 Gratt. 224.

counsel for the plaintiff in error which seem to hold these views.[3] But as an original question it is obvious that all possible notice is given by the progress of the work itself, and under our system of laws every citizen is held charged with notice of the public law. This question has been heretofore considered and decided by this court in the case of Norfolk v. Ellis,[4] opinion of Staples, J., and should not now be considered an open question here. This court said in that case: 'These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots. It is regarded as a system of equivalents. It imposes the tax according to the maxim, that he who receives the benefit ought to bear the burden, and it aims to exact from the party assessed no more than his just share of that burden, according to an equitable rule of apportionment.' Judge Staples, saying, speaking for the court: 'My understanding has always been that if the mode of assessment is regular and constitutional, if the power to levy the tax exist in that class of cases, the courts are not authorized to interfere merely because they may consider the taxation impolitic, or even unjust and oppressive. In such case the remedy is in the legislatures, and not in the judicial department. Cases without number might be cited in support of this principle,[5] where the authorities are reviewed by Judge Joynes.'

In the case before us it appears that the city council of Lynchburg, for the purpose of grading and paving its streets, has adopted the system of assessments by the front foot on lots adjacent to the street to be improved. The same system has been adopted in other towns and cities of the United State, and has been generally recognized by the courts as constitutional and valid. It is sustained by the highest courts in New York, Ohio, Michigan, Wisconsin, Missouri, California, Kansas, Connecticut and Pennsylvania.[6] It must be held to be a settled principle in this State that such assessments made under the authority of the public law, are valid and binding, and whatever remedy is to be applied, if any, must come from the law-making power, and not from the courts. We cannot be unmindful of the salutary principle *stare decisis.*"

[3] Stuart v. Palmer, 74 N. Y. 188; Santa Clara Co. v. Railroad Co., 18 Fed. Rep. 385; Mulligan v. Smith, 59 Cal. 206; Gatch v. City of Des Moines, 18 N. W. Rep. 310; Brown v. City of Denver, 3 Pac. Rep. 455.

[4] 26 Gratt. 227.

[5] People v. Lawrence, 41 N. Y. 137; Bank v. Billings, 4 Pet. 514; Langhorne v. Robinson, 20 Gratt. 661.

[6] Sedg. St. & Const. Law, 502-505, and cases cited in Cooley on Const. Lim. 507; Railroad Co. v. City of Lynchburg, 81 Va. 473.

POWERS OF FOREIGN INVOLUNTARY ASSIGNEES.

1. As to Domestic Realty—Universal Rule.
2. As to Domestic Personalty—English Rule.
3. As to Domestic Personalty—American Rules.
4. Effect of Voluntary Assignments in Aid of Involuntary Ones—Conflicting Rules.
5. When and How can Foreign Involuntary Assignees Sue in the Domestic Forum—Under Common and Statutory Laws.

1. *As to Domestic Realty.*—By the universal rule, foreign involuntary assignments do not transfer title to domestic realty.[1] Hence foreign assignees have no interest, legal or equitable, therein and can bring no suit concerning it. Transfers of realty are governed, as to their form and validity, by the law of the place where the property is situated (*lex loci rei sitæ*).[2] Statutes cannot operate extra-territorially upon real estate.

2. *As to Domestic Personalty—English Rule.*—By the English rule, assignments of personalty, voluntary or involuntary are governed by the law of the debtor,s domicil (*lex domicilii.*)[3] If valid by that law, they are

[1] Robson on Bankruptcy, pp. 503, 504; Story on Conf. of Laws, § 424; Cockerell v. Dickens, 1 M. D. & DeG. 45, 79; *Ex parte* Rucker, 3 Dea. & Ch. 704; Selkrig v. Davis, 2 Dow. 245; 2 Rose, 291; Waite v. Bingley, 21 Ch. D. 674; Macdonald v. Georgian Lumber Co., 2 Can. S. C. Rep. 364; Oakley v. Bennet, 11 How. 33; Hutcheson v. Peshine, 16 N. J. Eq. 167; Osborn v. Adams, 18 Pick. 245; Rodgers v. Allen, 3 Ohio, 489.

[2] See note 1; also Houston v. Nowland, 7 Gill & Johns. (Md.) and Gardner v. Lewis, 7 Gill (Md.), 377 (as to voluntary assignments).

[3] Robson on Bankruptcy, p. 503; Brickwood v. Miller, 3 Mer. 279; Jollett v. Deponthieu, 1 H. Bl. 132, note; Neale v. Cottingham, *Ib.* 133, note; Sill v. Worswick, *Ib.* 665; Solomons v. Ross, *Ib.* 131; Phillips v. Hunter, 2 *Ib.* 403; Hunter v. Potts, 4 Term R. 182; MacIntosh v. Ogilvie, *Ib.* 193, note and 3 Swans. 365, note; Alivon v. Furnival, 1 C. M. & R. 276, 296; Bank of Scotland v. Cuthbert, 1 Rose, 463, 472: Selkrig v. Davis, 2 *Ib.* 291; Stephens v. M'Farland, 8 Ir. Eq. 444; *In re* Robinson, 11 Ir. Ch. 385; *In re* Davidson, 15 L. R. Eq. 383; Cockerell v. Dickens, 1 M. D. & DeG. 45, 79; Banco de Portugal v. Waddell, 5 App. Cas. 161; *Ex parte* Wilson, 35 Beav.; *In re* Douglass L. R., 7 Ch. 490; *In re* Blithman, 35 Beav. 219; Roper v. Shannon, 2 Nova Scotia, 146; *In re* Carvell, *Ex parte* Gliddon, 5

valid everywhere. So far as the English law can accomplish it, an involuntary assignment made at the debtor's domicile will pass to his assignees his personal assets all over the world against all parties. The distinction between foreign realty and personalty was well illustrated in the case of Cockerell v. Dickens[4] That was a case of an assignment in insolvency in India. A creditor, before proving his claim had collected a part of his debt out of real estate in Java and instituted prooceedings to collect another part out of personalty in Sumatra. The court upon bill in equity restrained him from collecting the personalty, but allowed him to retain the proceeds of the realty as that did not belong to the assignees. The English courts, so far as they can, treat the entire personal assets as one common fund and all creditors as entitled to equal dividends. In case there are bankruptcies both at home and abroad, a creditor who has taken a dividend abroad cannot receive another in England until the creditors there proving have received dividends equal to those paid abroad.[5] The English rule, as affected by foreign proceedings, was well stated by Lord Selborne in the House of Lords in case of a Portuguese *cessio bonorum*.[6] "The Portuguese assets were by the law of *England* which we have to administer * * subject to and bound by the English liquidation, except so far as the local law of Portugal might have intercepted any portion of them while within its jurisdiction." The British courts, whenever they can, compel creditors who intercept these assets to restore them. Many times they have aided foreign and colonial assignees to get possession of the English assets, sometimes against the bankrupt himself and his debtors and representatives, and sometimes against English attaching creditors.[7] They require their own creditors to account for all personalty collected abroad.[8]

3. *As to domestic Personalty—Under the American Rules.*—By the American rule foreign involuntary assignments do not pass title to domestic personalty as against *domestic* attaching creditors,[9] nor against foreign creditors *not* residing where the assignments were made.[10] The American courts are divided upon the question whether they are valid against creditors residing where the assignments were made.[11] But they are virtually united in holding them valid (as transfers of the *beneficial* interest) against the bankrupt[12] and his debtors.[13]

Russ. & Geld (Nova Scotia), 410; Kemp v. Jones, 12 Grant's Ch. (Ont.) 260.

[4] 1 M. D. & DeG. 45.

[5] Banco de Portugal v. Waddell, 5 App. Cas. 161 (Portugese *cessio bonorum*); *Ex parte* Wilson *In re* Douglass L. R., 7 Ch. 490 (Brazilian *concordata*).

[6] Banco de Portugal v. Waddell, 5 App. Cas. 161 (Portugues *cessio bouorum*); *Ex parte* Wilson *In re* Douglass L. R., 7 Ch. 490 (Brazilian *concordata*).

[7] Alivon v. Furnival, 1 C. M. & R. 277, 296; (French syndic. Suit at law against bankrupt's debtor); Solomons v. Ross, 1 H. Bl. 131, note (Dutch curators, Suit in equity, against attaching creditors); Stephens v. M'Farland, 8 Ir. Eq. 444; *In re* Davidson, 15 L. R. Eq. Cas. 383 and *In re* Blithman, 35 Beav. 219 (Australian assignees recover English personalty against insolvent's representatives); Jollett v. Deponthieu, 1 H. Bl. 132, note (Dutch curators, Injunction against English attaching credstors); Bank of Scotland v. Cuthbert, 1 Rose, 463, 472 (Scottish court refuses to sequester Scottish property of English bankrupt); Kemp v. Jones, 12 Grant's Ch. (Ont.) 260 (English assignees sue for bankrupt's property); Roper v. Shannon, 2 Nova Scotia, 146 and *Re* Carvell; *Ex parte* Gliddon, 5 Russ. & Geld (Nova Scotia), 410 (British assignments pass personal property against local attachments).

[8] Hunter v. Potts, 4 Term R. 182; Sill v. Worswick, 1 H. Bl. 665; Phillips v. Hunter, 2 H. Bl. 403 (Euglish assignees recover amount collected; Neale v. Cottingham, 1 H. Bl. 133, note (Assignees recover in Ireland of English crediters); Macintosh v. Ogilvie, 4 T. R. 193, note (*Ne exeat* issued against one arresting Scotch assets); *In re* Robinson, 11 Ir. Ch. 385 (Irish assignees recover proceeds of goods attached in New York).

[9] Harrison v. Sterry, 5 Cranch, 289; Felch v. Bugbee, 48 Maine, 1; Saunders v. Williams, 5 N. H. 213; Dalton v. Currier, 40 *Ib.* 237; Dunlap v. Rogers, 47 *Ib.* 281; Blake v. Williams, 6 Pick. 287; Goodsell v. Benson, 13 R. I. 225; Holmes v. Remson, 20 Johns. (N. Y.) 229; Miller v. Hunt, 23 Wend. (N. Y.) 87; Wallace v. Patterson, 2 H. & M'H. (Md.) 463; Bank v. M'Clain, 1 *Ib.* 236 (per Dulaney, J.); Robinson v. Crowder, 4 M'Cord (S. C.), 519; Topham v. Chapman, 1 Mills' Cons. Rep. (S. C.) 283. *Contra*: Holmes v. Remson, 4 Johns. Ch. (N. Y.) 460.

[10] Paine v. Lester, 44 Conn. 196; Milne v. Moreton, 6 Bin. (Penn.) 353; Beer v. Hooper, 32 Miss. 246.

[11] The following cases hold that they: Devisne v. Wyethe (Va.), 298; Bank v. M'Clain, 1 H. & M'H. (Md.) 463; Mulliken v. Aughinbaugh, 1 Penn. 117; Hoag v. Hunt, 21 N. H. 106; Einer v. Beste, 32 Mo. 240; Hall v. Boardman, 14 N. H. 38; Dehon v. Foster, 4 Allen (Mass. 545; Pomroy v. Lyman, 10 *Ib.* 468; Cunningham v. Butler, 142 Mass. 47; Eddy v. Winchester, 60 N. H. 63; Bagby v. At., Miss. & O. R. R., 86 Penn. St. 291 (a case of a receiver). The followipg cases hold that they are not: Taylor v. Geary, Kirby (Conn.), 313; Upton v. Hubbard, 28 Conn. 274; Wallace v. Patterson, 2 H. & M'H. (Md.) 463 (one creditor was British); Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; Rhawn v. Pearce, 110 Ill. 350; Jenks v. Ludden, 27 N. W. Rep. (Minn.) 188.

[12] Matter of Waite, 99 N. Y. 433; Milnor v. Metz, 16 Pet. 221. *Contra:* Abraham v. Plestoro, 3 Wend. 538, revereing Plestoro v. Abraham, 1 Paige, 236.

[13] Bird v. Caritat, 2 Johns. (N. Y.) 342; Raymond v.

4. *Effect of Voluntary Assignments in Aid of Involuntary Ones.*—The decisions are in such conflict that it is very hard to extract any general rule from them. It is claimed by those, who consider the voluntary assignment in aid as of no effect, that the bankrupt is incapacitated from making any assignment,[14] because as to him the involuntary assignment has transferred away the entire title to the foreign property. That argument is considered unsound in principle by Justice Story,[15] who says the title cannot be in the bankrupt for one purpose and out of him for another. That is, if the title to the property is in the debtor, so that creditors can attach it, it must also be in the debtor, so that he can convey it to his assignee in insolvency. It is opposed also by the opinion of Chancellor Kent.[16] It would seem to have less force as applied to realty than to personalty since, as all courts agree, the involuntary proceedings do not divest the bankrupt of his foreign realty. In Holmes v. Remson,[17] Lamb v. Fries,[18] and Graydon v. Church,[19] such assignments were held effectual to transfer the debtors foreign property. In Holmes v. Remson, New York personalty was transferred to a British assignee in bankruptcy in Lamb v. Fries, Pennsylvania realty, to a New Jersey involuntary assignee and in Graydon v. Church, Michigan realty, to a New York receiver. In Holmes v. Remson,[20] Robinson v. Crowder,[21] and Dalton v. Currier,[22] such assignments were held ineffectual to convey foreign personalty. And in Osborn v. Adams,[23] and Macdonald v. Georgian Lumber Co.,[24] they were held ineffectual to convey foreign realty. The two latter cases, however, depend upon special circumstances and are not necessarily authorities against the validity of all assignments in aid. nI Osborn v. Adams, the assignment which was in aid of a Connecticut involuntary one was not assented to by the creditors (as required by the law in Massachusetts) and hence, as its validity depended on the *lex loci rei sitæ*, it was fraudulent as to non-assenting creditors. In Macdonald v. Georgian Lumber Co., the assignment which was in aid of one under the United States bankruptcy law was made compulsorily under a decree founded on the provision requiring bankrupts to execute conveyance of their foreign property. The Canada court held that this provision must be construed to refer to such property only as could pass by an involuntary assignment and therefore the assignment of realty was void. Had the assignment been voluntarily executed it might *perhaps*, have been sustained. It was held under the former *English* bankruptcy acts that the court had no power to order a bankrupt to convey his foreign realty, though it was said that the creditors might compel him to do so by withholding the certificate,[25] and it is the opinion of Mr. Robson that there is no power under the present act to require him to do it. In Waite v. Bingley,[26] Vice-Chancellor Hall concedes that the Australian courts had power under the statute (but they had not executed it) to compel an Australian bankrupt to transfer his English realty to his Australian assignees. It seems to me that such an assignment were it executed under clear statutary powers ought to operate extra-territorially with as much effect as if it were a purely voluntary one. A creditor who succeeds in collecting part of his debt out of foreign realty can retain it. He is in the condition of one who has security upon the property of a stranger.

5. *When and how can Foreign Involuntary Assignees Sue in the Domestic Forum.*—Admitting the foreign assignee's right to the property, the *form o suit* is a question wholly of the *lex fori*.[27] For choses in possession

Johnson, 11 *Ib.* 488; Hunt v. Jackson, 5 Blatchf. 349; Blane v. Drummond, 1 Brock, 62; Perry v. Barry, 1 Cranch C. Ct. 204 (per *curiam*); Merrick's Est., 2 Ashm. (Phila. Orphan's Ct.) 485; Kirtland v. Lowe, 33 Miss. 423 (per Handy, J.); Tully v. Herrin, 44 Miss. 626; Story on Conf. of Ls., § 420.

[14] Platt, J., in Holmes v. Remson, 20 Johns. (N. Y.) 229, 267; Johnson, J., in Robinson v. Crowder, 4 M'Cord (S. C.), 519. 538. Justice Johnson argues also that because the voluntary assignment was in aid of an involuntary one and intended to give an effect inconsistent with the laws of this country, it was therefore void.

[15] Story on Conf. of Ls., § 418.

[16] Holmes v. Remson, 4 Johns. Ch. (N. Y.), 460, 489.

[17] 4 Johns. Ch. (N. Y.) 460, 489.

[18] 2 Penn. St. 83.

[19] 7 Mich. 36.

[20] 20 Johns. (N. Y.) 229, 267.

[21] 4 M'Cord (S. C.), 519, 538.

[22] 40 N. H. 237.

[23] 18 Pick. 245.

[24] 2 Canada S. C. Rep. 364.

[25] Robson on Bankruptcy, p. 504; Selkrig v. Davis, 2 Rose, 291; 1 Dow. 230; Cockerell v. Dickens, 1 M. D. & DeG. 45, 79.

[26] 21 Ch. D. 674.

[27] Story on Conf. of Ls., § 565; Kent Chan. in Bird v.

a foreign assignee may sue in his own name.[28] And he can sue in his own name in equity in cases within the equitable jurisdiction.[29] For non-assignable choses in action (by the principles of the common law) he cannot, under the American rule (of limited extra-territorial operation of involuntary assignments) sue at law *in his own name.*[30] Such suits may, however, be brought in name of insolvent or bankrupt for benefit of his assignee.[31] In States where the rule of the common law has been changed, assignees may sue in their own names.[32] Even under the English rule, it was doubtful whether a foreign involuntary assignee could sue at law upon a chose in action in his own name.[33] Voluntary assignees cannot (at common law) either at home or abroad.[34] The right of an involuntary assignee to sue at home is derived from statute.[35] In this respect involuntary assigments are not allowed (at least in America) any greater operation abroad than voluntary ones.[36] The question, therefore, whether a foreign involuntary assignee could sue at law in his own name in the domestic forum would depend upon whether the rule of the common law as to form of suit remained there or had been changed.

WILLIAM WEBSTER.

Caritat, 2 Johns. (N. Y.) 342; Marshall, C. J. in Blane v. Drummond, 1 Brock, 62, 67; Fisk v. Brackett, 32 Vt. 798; Kirtland v. Lowe, 33 Miss, 423, etc.

[28] Story on Conf of Ls., § 565.

[29] Milnor v. Metz, 16 Pet. 221; Hooper v. Tuckerman, 3 Sandf. (N. Y. Superior Ct.) 311; Jollett v. Deponthieu, 1 H. Bl. 132, note; Neale v. Cottingham, 1 *Ib.* 133, note; Solomons v. Ross, 1 *Ib.* 131, note; Stephens v. M'Farland, 8 Ir. Eq. 444.

[30] Story on Conf. of Ls., § 565; Fisk v. Brackett, 32 Vt. 798; Tully v. Herrin, 44 Miss. 626; Perry v. Barry, 1 Cranch C. Ct. 204; Bird v. Pierpoint, 1 Johns. (N. Y.) 118 (per Livingstone, J.). See, however, Goodwin v. Jones, 3 Mass. 514, 517 (per Parsons, J.).

[31] Bird v. Caritat, 2 Johns. (N. Y.) 342; Raymond v. Johnson, 11 *Ib.* 488; Kirtland v. Lowe, 33 Miss. 423; Merrick's Est., 2 Ashm. (Phila Orphan's Ct.) 485; Dawes v. Boylston, 9 Mass. 337 (per Sewell, J.).

[31] Matter of Waite, 99 N. Y. 433; Hunt v. Jackson, 5 Blatchf. 349.

[32] Alivon v. Furnival, 1 Cr. M. & R. 297 (Suit by French syndic. allowed; Jaffrey v. M'Taggart, 6 Mau. & Sel. 126 (Assumpsit by Scotch trustee disallowed); Wolff v. Oxholm, 6 *Ib.* 92, 99 (Semble, per Ld. Ellenborough).

[34] Orr v. Amory, 11 Mass. 25.

[35] Kent. Chan in Bird v. Pierpoint, 1 Johns. (N. Y.) 118.

[36] Story on Conf. of Ls., § 565.

MUNICIPAL CORPORATIONS—LETTING CONTRACT—ACCEPTING AND REJECTING BIDS—ABUTTING LOT OWNERS.

ROSS V. STACKHOUSE.

Supreme Court of Indiana, March 27, 1888.

1. *Accepting Bids.*—Where a city council has properly advertised for bids for a public improvement, and then voted to reject all the bids, afterwards, without advertising, reconsiders this action and lets the contract to the lowest bidder: *Held*, that this action was proper, and could not be excepted to by an abutting lot owner.

2. *Right of Council to Reconsider Measures, etc.*—The right to reconsider measures in pursuance of rules adopted for its government, inheres in every body possessed of legislative power, and unless such right be exercised unreasonably and for a fraudulent purpose to the injury of the party complaining.

3. *Estoppel—Abutting Lot Owners.*—An abutting lot owner whose land has been assessed for the improvement, cannot question the regularity of the proceedings after having stood by and receives the benefit of the improvement.

MITCHELL, C. J., delivered the opinion of the court:

Stackhouse appealed from a precept issued by order of the common council of the city of Lafayette, in favor of John A. Ross, for the collection of assessments made upon the property of the former; the latter having, as is alleged, duly completed a contract entered into with the city for the improvement of a certain street. A transcript of all the proceedings had before the common council were filed in the circuit court. It appeared that a properly entitled ordinance had been duly adopted on the 20th day of November, 1882, in and by which it was ordained, among other things, "that Fifth street, from the south line of Alabama street to the north line of Romig street, be improved by graveling in street, brick sidewalks, and paved gutters," according to specifications to be prepared by the city civil engineer. The ordinance further required that the city clerk should advertise for bids, after the specifications had been prepared by the engineer and adopted by the council; and provision was also made for assessing the cost of the improvement against the abutting property. The letting of the work was duly advertised, and on the 18th day of December, 1882, at a regular meeting of the common council, all the bids, including one made by Ross, were, by a vote of the council, rejected. Subsequently, on the 15th of the following January, Ross applied to the council, and demanded a reconsideration of the vote by which the bids were rejected, on the ground that he was entitled to the contract; his being, as he asserted, the lowest and best bid submitted. Afterwards, on the 5th day of February, 1883, the council reconsidered its action, and let the contract to Ross, he having proposed to do the work for some $300 less than any other bidder. The work was

duly executed by the contractor, and accepted by the city; final estimates having been regularly made and approved before the precept appealed from was ordered. The court sustained a demurrer to the transcript, which, under the statute, constitutes the complaint on appeal in a proceeding such as this. The contractor, Ross, prosecutes this appeal. The ruling of the circuit court is defended upon two grounds. It is argued that the proceedings of the common council, in ordering and contracting for the improvement, were void (1) because, having once exercised the right of decision by rejecting all bids, and then adjourning generally, it is insisted that its power to let the work was thereby exhausted, and that it could not proceed without ordering a new advertisement; (2) it is contended that the ordinance, as above set out, under which the improvement was made, was too vague and indefinite to constitute a valid order for the work.

While it is true that the statute prohibits the trial of any question of fact which arose prior to the making of the contract for a street improvement, it is nevertheless essential that the transcript should show the taking of such jurisdictional steps as legally authorized the common council to contract for the improvement. It must appear that the letting of the contract was advertised. In the absence of notice inviting proposals for the work, the contract will be invalid. Moore v. Cline, 61 Ind. 113; Overshiner v. Jones, 66 Ind. 452; Yeakel v. City of Lafayette, 48 Ind. 116: Baker v. Tobin, 40 Ind. 310; Moberry v. City, etc., 38 Ind. 198; Indianapolis v. Imberry, 17 Ind. 175; Anthony v. Williams, 47 Ind. 565. In the present case it is not denied but that the letting of the contract was properly advertised in the first instance, but it is said, because the common council voted to reject all the bids, its power in respect to that advertisement and letting was at an end, and that all its subsequent proceedings were void. It is settled that where the act or decision of a common council or other similar body is done or made in pursuance of notice which the law requires, and is, in its nature, such as to adjudicate upon or determine or affect the substantial personal or property rights of those notified, a decision once rendered cannot ordinarily be rescinded or set aside. City of Madison v. Smith, 83 Ind. 502. This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such subjects may modify, repeal, or reconsider their action in regard to matters of that nature at any time, provided the vested rights of others are not thereby affected. Over such matters they exercise a continuing power. Welch v. Bowen, 103 Ind. 252, 2 N. E. Rep. 722; Board, etc. v. Fullen, 111 Ind. 410, 12 N. E. Rep. 298. The purpose of requiring the letting of contracts for street improvements to be advertised, is to secure fair competition, and to enable the common council to let the contract upon the most advantageous terms. 1 Dill. Mun. Corp. § 468. The advertisement is not to give notice to the property holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the common council. Platter v. Board, 103 Ind. 360, 2 N. E. Rep. 544. The right to consider measures, in pursuance of rules adopted for its government, inheres in everybody possessed of legislative power; and unless such right be exercised unreasonably and for a fraudulent purpose, to the injury of the complaining party, courts cannot interfere. It does not appear but that the council, in reconsidering its previous vote, proceeded in strict conformity to its rules; and, as no rights had attached, we can perceive no sufficient reason for holding its proceedings void.

Without considering that feature of the case further, we are quite certain, since the record shows that the letting of the contract was advertised, that the rejection of the bids, and the subsequent reconsideration of its vote by the common council, cannot render the notice which appears in the record, and which the council must have adjudged sufficient, of no effect. Section 3133, Rev. St. 1881, declares, in effect, that no question of fact shall be tried on appeal, in a case like the present, which may have arisen prior to the making of the contract for the improvement. Where the record shows that notice was given, which the council must have deemed sufficient, the effect of the statute is to exclude any further inquiry on that subject, as well as concerning any other fact which may or must have arisen, if at all, prior to the making of the contract for the improvement. Martindale v. Palmer, 52 Ind. 411; McGill v. Bruner, 65 Ind. 421; Hellenkamp v. City of Lafayette, 30 Ind. 192. The rejection of the bids, and the reconsideration of its vote by the common council, were facts which occurred prior to the making of the contract. After the work has been done, the contract cannot be overthrown by going back and appealing to these facts. Where it affirmatively appears that the jurisdictional steps have been taken upon which the power of the common council to contract depends, a contractor may rely upon the record, even though the jurisdictional facts may appear imperfect and irregular. After he has entered upon the work, and expended money and labor for the benefit of the property owner, the latter will not be permitted to impair or break down the jurisdiction upon which the contractor may have relied, by bringing forward merely incidental matters, or by proof of extraneous facts, unless fraud or collusion be shown. The issues to be tried in a case like the present are whether or not, in ordering the work, and letting the contract, the common council proceeded under color of the statute, whether the work has been done in whole or in part according to the contract, and whether an estimate has been duly made of the work. Gulick

v. Connely, 42 Ind. 134; Ball v. Balfe, 41 Ind. 221; Rev. St. 1881, § 3165. Some of these are issues of law, to be tried by the record, while in respect to all such matters as arose after the contract was entered into issues of fact may be made and tried. In the present case the transcript shows that due notice was given, advertising the fact that on a day named the contract would be let. It shows that bids were received, and that the contract was let upon what the common council adjudged to be a sufficient notice. Having acquired jurisdiction by the publication of notice to let the contract, the statute effectually precludes any inquiry into such merely incidental facts as the rejection of the bids in the first instance, and the subsequent reconsideration of its vote by the common council.

Regardless of the statute, however, it must be considered as settled by the decisions, and upon established principles, that where it appears, in a proceeding of this character, that an attempt was made to give notice, and that some notice was given, which the body charged with the duty acting adjudged to be sufficient, a party whose property is to be benefited by the improvement cannot quietly stand by, and receive the benefit, and then question the regularity of the proceedings. Taber v. Fergason, 106 Ind. 227, 9 N. E. Rep. 723; Taber v. Grafmiller, 109 Ind. 206, 9 N. E. Rep. 721; Balfe v. Lammers, 109 Ind. 349, 10 N. E. Rep. 92; City of Lafayette v. Fowler, 34 Ind. 140; Peters v. Griffee, 108 Ind. 121, 8 N. E. Rep. 727; Updegraff v. Palmer, 107 Ind. 181, 6 N. E. Rep. 353; Montgomery v. Wasem (present term), 15 N. E. Rep. 795. Unless the proceedings are so radically defective as to be totally void, a contractor who has executed the work may invoke the doctrine of estoppel for his protection. Where the record of the proceedings show color of jurisdiction, the property owner, until the contrary appears, will be presumed to have had notice of the progress of an improvement from which his property was being benefited (Taber v. Fergason, *supra*), and having notice, and failing to object, and arrest the improvement, until the benefit has accrued, he will be deemed to have ratified the proceeding as fully as does one who receives the proceeds of a judgment or sale with knowledge of inherent infirmities which render it voidable or even void. Fletcher v. McGill, 110 Ind. 395-404, 10 N. E. Rep. 651, 11 N. E. Rep. 779. Special assessments for street and other similar improvements are upheld upon the theory that each lot or tract of land assessed, is benefited, in a special and peculiar manner, in a sum equal to the amount estimated or assessed against it. The lien is therefore enforceable against the land, upon the theory that the owner has received a personal and pecuniary benefit by the improvement, which the citizens do not share in common. Heick v. Voight, 110 Ind. 279, 11 N. E. Rep. 306; Lipes v. Hand, 104 Ind. 503, 1 N. E. Rep. 871, 4 N. E. Rep. 160; Chamberlain v. Cleveland, 34 Ohio St. 551; Stuart v. Palmer, 74 N. Y. 189; Hammett v. Philadelphia, 65 Pa. St. 146. Unless, therefore, the law under which the assessment is imposed, makes no provision for notice, or unless the proceedings under which the proposed improvement is to be made are totally void for want of the observance of some condition necessary to the attaching of jurisdiction, the work cannot be arrested at any stage; and, in any event, one who acquiesces, with knowledge, until after the improvement has been completed, cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the contractor proceeded in good faith and without notice from the property owners. He cannot enjoy the benefits and escape the burden, unless he interferes or gives notice before the benefit is received.

In respect to the claim that the ordinance directing the improvement was void for vagueness and uncertainty, it is only necessary to say that within the ruling in Taber v. Graffmiller, *supra*, the point is not well made. No other objection having been pointed out, we assume that the transcript was otherwise unobjectionable.

It follows from what has preceeded that the circuit court erred in sustaining the demurrer to the complaint. The judgment is reversed, with costs.

NOTE.—The case of Welch v. Bowen, referred to in the principal case, was one in which power was given by statute to the county commissioners to determine what kinds of animals should be allowed to run at large on the uninclosed lands or public commons. The commissioners exercised the power, designating what animals should be permitted to run at large, and then afterwards again exercised this power by repealing their former act. It was sought to annul this latter act for the reason that they had once exercised the power given by the statute, and that their later action was without authority. The court, however, held that the power was a continuing one, and that the act repealing was valid.[1]

In Twiss v. Port Huron, where the charter of the municipal corporation required that the contract for public improvement be let to the lowest bidder, it was held that the city council had no power to release the lowest bidder from his offer without advertising again, and allowing the other bidders to revise their bids. In this case three bids were received, the person having the lowest, shortly after the bids was made, and at the meeting at which the bids were all submitted to council, informed them he had made a mistake and desired to withdraw his bid. This was permitted, and the contract was let to the next lowest. This, the court held, could not legally be done. There is a very able dissenting opinion in this case from Judge Sherwood, in which he maintains that the council had a perfect right to do as they did. The majority decision in the case is in conflict with the principal case.[2]

It has been held that while commissioners may have power to accept or reject bids, they have no power to permit one to be privately amended so as to make it better than another, or to render it acceptable to them.[3]

[1] Welch v. Bowen, 103 Ind. 252.

[2] Twiss v. City of Port Huron (Mich., 1886), 30 N. W. Rep. 177-182.

[3] State v. Dodge, 11 Neb. 484; S. C., 9 N. W. Rep. 691.

Even where a city charter does not require contracts to be let to the lowest bidder, still the contracts must be fairly made at reasonable prices, with due regard to lot owners' interests, or equity will relieve against them.[4] A bid to furnish articles "at just what it costs to lay them down" is too indefinite.[5]

In the case of The State v. Directors,[6] the directors of the Ohio Penitentiary gave notice that they would receive proposals for the labor of fifty convicts to be worked at the manufacture of wood types, etc., and that bids would be considered for the manufacture of any other article or any kind of business, with the exception of one bid. H made the highest bid. The directors refused to enter into a contract with H but closed a contract with D and C at a less bid than H's. It was held that the directors were authorized to exercise a discretion in regard to H's bid and reject it.

In State v. Com. of Hamilton Co,[7] the commissioners of Hamilton Co., advertising for proposals for blank books and stationery for the year 1871, requiring bidders to give prices of various articles required, but did not state the quality of any article that would be required. The total amount of the prices thus fixed for one of the articles required in the proposals of the relators, was lower than that of any other bidder; but it appeared that upon a fair estimate of the quantities that would be required, the aggregate cost of all that would be required would amount to more at the prices fixed by the relator and another bidder. It was held that the relators were not, within the meaning of the statute, the lowest builders. If the notice inviting proposals is defective in excluding fair competition, the commissioners cannot be required to award the contract to any of the bidders.[8]

In State v. Nevins,[9] it was said by the second section of act fifteen, of our State constitution and the statutes under it, the public printing is required to be let upon contract by the commissioners of public printing to the lowest responsible bidder. Whether the lowest responsible bidder, when refused the contract, has any legal rights which as such lowest bidder he can enforce, whether the commissioners, by granting the contract in good faith to another person, have thus exhausted their powers, and cannot, therefore, until that contract is set aside, make another with the proper person; and whether the commissioners have in a supposable case discretionary power to refuse a contract with the lowest responsible bidder, are questions argued in this case, but which we do not deem it necessary to decide. The court surely has some disdretionary power in granting or refusing a *mandamus*, and we are quite satisfied, irrespective of the proper decision of the questions named, that in the exercise of such a power in ought to refuse, that form of remedy in the present case.

The relators do not inform us how much lower their bid was than that of Webb, or whether the difference was nominal. For ought that appears, the object, the object of the law, which was to save expense to the State and not enrich the bidder, will be better affected by performing than by attempting to rescind the contract with Webb.[10]

In State v. Commissioners,[11] where the statute required that certain matter should be left to the lowest bidder, and that he should give bond, it was held that where a bond was not tendered, within a reasonable time that the next lowest bid could be accepted, that it was not the duty of the commissioners to demand the bond but that it was the duty of the bidder to tender it.

When the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal, and in an action brought on such contract the city may plead its legality in defense.[12]

A promise that the "commissioners shall in no case proceed with the construction of any sewer, except upon advertisement" to be let to the lowest bidder, applies only to a contract for original construction. If the original contractor abandons the work, it is not necessary to readvertise and let to the lowest bidder, the original contractor being liable for the excess of cost over his contract price.[13]

Where the charter requires that all the work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is relet, an assessment upon a lot of work done is void if the contract was let or *relet* without notice.[14]

"The notice inviting proposals to do the work" says Judge Williard, in delivering the opinion in Smith v. Mayor,[15] did not, in my judgment, bind the street commissioners of the corporation to accept at all events, the lowest bid, even though in all respect formal, until the bid is accepted by some act on the part of the corporation no obligatory contract was created.[16]

Upon the power of councils to reject or accept bids, the case of Attorney General v. Detroit,[17] is an important and interesting one from a very able judge (Cooley), in this case the court says:

The wrong complained of here is a disregarded of the provision of the city charter, which requires contracts to be publicly let to the lowest responsible bidder. The facts appear to be that the common council, having determined to cause St. Aubin avenue to be paved, instead of determining in advance what particular kind of pavement should be put down and confining their investigation for proposal to that kind, caused specifications for each of several different kinds of wood and stone pavement to be prepared and filed with the comptroller, and then advertised that sealed proposals would be received during a time specified for paving said avenue with either wood or stone

4 Cook v. Racine, 49 Wis. 243; Kingsley v. Brooklyn, 5 Abb. N. C. 1.

5 State v. York Co., 13 Neb. 57; s. c., 12 N. W. Rep. 816.

6 5 Ohio St. —.

7 20 Ohio St. —.

8 Cook Co. v. Commissioners, 31 Ohio St. 415. See State v. Yeatman, 22 Ohio St. 546; Upington v. Oviatt, 24 Ohio St. 232; Beaver v. Trustees, 19 Ohio St. 97; Breslin v. Brown, 24 Ohio St. 565.

9 19 Ohio St. 389.

10 Cases cited in argument: Moses on Mandamus, 124; People v. Canal Board, 13 Barb. 432; People v. Croton Aqueduct, 26 Barb. 240; People v. Contracting Board, 27 N. Y. 378.

11 26 Ohio St. 534.

12 Brady v. Mayor, 30 N. Y. 312; People v. Flagg, 17 N. Y. 584; Peterson v. Mayor, 17 N. Y. 457; Harlem, etc. v. Mayor, 33 N. Y. 389; Macey v. Titcomb, 19 Ind. 153; Green v. Mayor, 60 N. Y. 303; Yarnald v. Lawrence, 15 Kan. 126; Nash v. St. Paul, 8 Minn. 172; White v. New Orleans, 15 La. Ann. 667; State v. Barlow, 48 Mo. 17; Brevort v. Detroit, 24 Mich. 322.

13 Leeds, 53 N. Y. 400.

14 Mitchell v. Milwaukee, 18 Wis. 92; Wells v. Burnham, 20 Wis. 112.

15 10 N. Y. 504.

16 See Argenti v. San Francisco, 16 Cal. 255; Wiggins v. Phil., 2 Brewst. (Penn.) 444; Altemus v. Mayor, 6 Duer (N. Y.), 446.

17 41 Mich. 234.

pavement, according to the specifications thus placed on file. It further appears that in response to this advertisement no fewer than fifty-seven proposals were received from different parties for putting down of various kind of wood and stone pavement, some of which were covered by patents, and others were open to be put down by any parties. The Detroit Ironizing and Paving Company submitted a proposal for putting down the Ballard patent pavement, with Medina curbstone, for $24,459.85, and Hillsendegen & Dunn proposed to do the same for $24,642.46. These were the only bids for that kind of pavement, but there were proposals for putting down other pavements at much smaller sums.

Hillsendgen & Dunn were the assignees of the Ballard patent, but the Ironizing and Paving Company tendered to the city ample indemnity against any liability to the owners of the patent if their proposal should be accepted. They were justified by a previous resolutions of the council in supposing that such security would be regarded as sufficient. The council, however, having determined to put down the Ballard pavement, rejected the bid of the Ironizing and Paving Company on the ground that they had no right to lay it, and therefore were not responsible bidders within the meaning of the law, and accepted the bid of Hillsendegen & Dunn, the assignee of the patent, whose right was supposed to be clear. It is a payment of money upon the contract with these parties which it is proposed to enjoin in this suit.

The first question involved in the merits of the suit is whether the council was justified in the manner mentioned to obtain proposals. It is insisted, on behalf of the attorney-general, that the kind of pavement to be put down should first be determined, and that bids should be called for and competition invited for that kind alone. It is denied that wood pavement can be put in competition with stone pavement, or that two kinds of wood pavement, essentially different in construction and cost, can be included in the same notice, which calls only for proposals for the paving of one street. The law, it is argued, intends that the bids shall settle the right to a contract on a mere inspection of the prices named; but if the bids are not to be all directed to the same specifications they settle nothing, and it will always be in the power of the council to reject the lowest bid on the pretense that it is for an inferior pavement, whether such is the truth or not, and to accept the bid of the desire to favor on the claim that, though his bid is higher, yet it is for a better pavement, and consequently such bid is, all things considered, the most for the interest of the city, and therefore to be deemed the lowest.

It is not to be denied that there is a good deal of truth in this argument; and if such a construction of the character as the complainant contends for will put it out of the power of the council to practice favoritism in awarding contracts, it ought to be sustained as the one which the legislature must have intended. We are not aware, however, that it has ever been supposed that the provisions of the character now in question would have that highly desirable effect; on the contrary it has often been observed that the most severe and stringent regulations of this nature may be administered dishonestly, though according to the strict letter of the law, so as not only to fail to give the proposed protection to the public, but on the other hand, so as to operate as if purposely devised to enable dishonest persons to plunder the public with impunity. The requirement that contracts shall be let to the lowest bidder is, in many cases, peculiarly susceptible of abuse. Its purpose is to secure competition among contractors for public works and supplies, and to give the public the benefit thereof. In some cases the most ample competition would be invited by presenting to bidders complete and particular specifications, which indicate the precise things wanted or which are to be done, and leave nothing to discretion or negotiation afterward. But this could only be true where the case was such that many persons could bid for the work or materials and would have a legal right to do the one and furnish the other, and when the materials were not monopolized in single hands, but were readily obtainable from several sources. If a patent article was desired which was to fix a royalty, or if stone or any other material were required, and a single person owned all within a practicable distance of the place where it is to be used, nothing could be more obvious than that proposals which confined bids to the particular or material would invite no valuable competition and that the protection of the public must lie in the power of the council to reject unreasonable offers. In such a case nothing is easier than for the council to obey strictly the letter of the law, and yet dishonestly and corruptly award a contract to one who is the lowest bidder for no other reason than because no one can bid against him, and who, having a practical monopoly, is allowed to fix his own terms.

Now if the purpose of the council is to secure competition in work or supplies for the public, something is necessarily left to the discretion of the council and they must determine in each case what competition the nature of the case will admit of and what is the best method to secure it. If they invite proposal for a particular thing or process they necessarily in so doing exclude everything else which might have been substituted for the thing called for; and there is no clearer field for corruption and favoritism than in shaping proposals if, in fact, the city is in hands.

The matter of paving affords an apt illustration of this trust. From the proposal before us it would be a reasonable inference that there are several patented wood pavements nearly equal in value and cost; but if the council call for proposal for one only they necessarily exclude all the others; and I am aware of no legislation, and I can conceive of no process by which they can be compelled always to make the selection from public motives exclusively if their dispositions shall be to do otherwise.

It would be worse than idle for the law to mark out, or for the council to follow, any one unvarying course in these cases. The same course which, under some circumstances, would be manifestly proper and most for the public good, under others would be so plainly detrimental and place the public so completely at the mercy of interested parties, that it could not be adopted by a body having any liberty of choice without justly subjecting themselves to the charge of corruption.

It must therefore be manifested that any inflexible rule which the law should lay down, and which should trust nothing to the integrity and nothing to the discretion of the council, must necessarily work mischief in many cases, and it would be productive of good, I think in few cases, if any.

I do not doubt that it was competent for the council in this case to have confined the bids to what is called the Ballard pavement. But if this had been done it must be obvious that the best method would not have been adopted to invite competition or to obtain cheap pavements. Assuming that pavement to be protected by valid patent, the assignees of the right were in posi

tion to fix their own terms in a contract or for the permission to lay it. But if another kind was of nearly equal value, competition might, perhaps, be had by putting the one against the other and inviting bids for both. The greater the number of such pavements, the larger is the opening for competition. It is quite true that if when the bids are in, the council may reject one on the ground of its being less valuable than another, it must follow that the bids are not conclusive upon the right to a contract; but that a right in the council to determine the kind is more likely to be exercised from dishonest motives after the bids are in than it would be in deciding what bids should be received, is not, to my mind, very apparent; on the contrary, the broader the door that is open to competition the greater will be the number of those who will be interested in watching the proceedings to see that just awards are made and impartial judgments pronounced. If there is danger of corrupt understanding and combinations when there are a score of bidders, the danger is proportionately increased when the door is closed against all but one or two. And when as in this case, the owners of the patented process are not only invited to bid against each other, but also be put in competition with all who may offer to lay the kind not patented, it is obvious that the council in their invitation for bids have done all that the nature of the case admitted of being done to secure competition for the public benefit. The proposals have had the spirit of the law in view, and I think are within the letter also.

If it is lawful to invite competition in this manner, it must also be lawful in passing upon bids to have regard to the relative value of the kinds bid for, and the rejection of the kinds for which the bids is lowest is therefore, not necessarily erroneous. But the rejection of the lowest bid for the particular kind fixed upon raises other questions.

When bids are thus called for, all bidders for a particular kind of pavement are bidders against all others, in a certain sense, but are also bidders against each other in a more particular sense. It would be the duty of the council, when all bids were in, to examine all, and to select the kind of pavement for which the bids, all things considered, were relatively the lowest. They might thus, perhaps, reject the kind they would have preferred in advance, but for which they find all bids exhorbitant, and determine upon another, because in their opinion, the offers made for it are more satisfactory. But when the kind is selected they have no discretion to be exercised in a choice between responsible bidders. The lowest has an absolute right to the contract.

In this case there were two bidders for the Ballard pavement, and the council awarded the contract to the highest. It is conceded that they did this on the sole ground that the lowest had no right to lay it, and consequently could not be considered a responsible bidder. Whatever security such a party might tender, it is said could not be adequate, because if he had not the right he might be enjoined in his attempt to put down. And at best the city would only take upon itself the risk of a long and expensive litigation by accepting such a bid, with the idemnity which might or might not after a time prove adequate.

Whether the council was justified in rejecting the lowest bid under the circumstance and upon the grounds stated, is a question I do not think we are called upon, by this record, to discuss, and I shall express no opinion upon it. The company who were lowest bidders took no step to compel the city to enter into a contract with them but suffered the award to stand, and heavy expenditures have been made in reliance upon it. They may, therefore, fairly be held estopped from setting up any claim now, and their appearance in this case as relators is of no importance. The only considerations to be weighed are those of a public nature. There are no indications of a deliberate purpose on the part of the council to disobey the law and misuse their franchise, but if they have erred it has doubtless been through mistake in judgment. All the interest which the public can have in the matter must therefore be of a pecuniary character, and be measured by the difference betweet the two bids. The difference is less than one-thirteenth of one per cent. of the whole sum, and less that one-sixth of this falls upon the city, the remainder being payable by individual lot-owners. The lot-owners do not complain, and when the amount thus becomes an individual charge the party concerned may properly be allowed to waive legal objection and make payment if he sees fit. The fund to be considered is therefore only that portion of the difference between the bids which would fall upon the city at large, and which in this case would constitute the measure of the public wrong. But that sum is considerably below the sum named in the statutes as the minimum of equitable jurisdiction.

A LICENSE TAX ON THE OCCUPATION OF DOING A BUSINESS IS A TAX ON THE BUSINESS.

LELOUP V. PORT OF MOBILE.

United States Supreme Court, May 14, 1888.

1. *Licenses—Occupations.*—A license tax on the occupation of doing business is a tax on the business.

2. *Telegraph—Interstate Commerce—Police Power.*—Communication by telegraph, if carried on between different States, is commerce between the several States, and directly within the power of regulation conferred upon congress, and free from the control of State regulations, except such as are strictly of a police character.

3. *Same—Telegraph Messages—State Taxes.*—The act of congress of July 24, 1866, about telegraph companies, is a legitimate regulation of commercial intercourse among the States, and, after a company has accepted the provisions of that act, State laws are unconstitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another.

4. *Interstate Commerce—State Taxation.*—No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.

Mr. Justice BRADLEY delivered the opinion of the court:

This was an action brought in the Mobile circuit court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed

upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the legislature of Alabama, and in force in August, 1883. The ordinance was as follows, to-wit: "Be it ordained by the Mobile police board, that the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: * * * On telegraph companies, $225. * * * Be it further ordained: For each and every violation of the aforesaid ordinance the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars." The complaint averred that the defendant, being the managing agent of the Western Union Telegraph Company, a corporation having its place of business in the said port of Mobile, and then and there engaged in the business and occupation of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, committed a breach of said ordinance by neglecting and refusing to pay said license to the said municipal corporation. The complainant further averred that for this breach the recorder of the port of Mobile imposed on the defendant a fine of five dollars, for which sum the suit was brought. The defendant pleaded that at the time of the alleged breach of said ordinance he was the duly appointed manager, at the port of Mobile, of the Western Union Telegraph Company. That said company "was, prior to the 5th day of June, 1867, a telegraph company duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That on said 5th day of June, 1867, the said telegraph company duly filed its written acceptance with the postmaster general of the United States of the restrictions and obligations of an act of congress entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 24, 1866. That in accordance with the authority of its said charter and the said act of congress, and by agreement with the railroad companies, the said telegraph company constructed its lines, and was at the time of the said alleged breach of said ordinance, maintaining, and operating said lines of telegraph, on the various public railroads leading into or through the said port of Mobile, to-wit, the Mobile & Ohio Railroad, a railroad extending from the said port of Mobile, in Alabama, through the States of Mississippi, Tennessee, and Kentucky, to Cairo, in the State of Illinois: the Louisville & Nashville Railroad, extending from Cincinnati, in the State of Ohio, through said port of Mobile, to New Orleans, in the State of Louisiana, with a branch extending from said State of Alabama over the Pensacola & Louisville Railroad to Pensacola, in the State of Florida. That the said telegraph lines so running into or through said port of Mobile connected with and extended beyond the *termini* of the said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said port of Mobile, to, through, and over all of the principal railroads, post roads, and military roads in and of the United States, and having offices for the transaction of telegraph business in the departments at Washington, in the District of Columbia, and in all of the principal cities, towns, and villages in each of the United States, and in the territories thereof. That all of said railroads so leading into and through the said port of Mobile and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon, under authority of law and the direction of the postmaster general, and that said railroads and each of them are post roads of the United States. That said telegraph lines are also constructed under and across the navigable streams of the United States, in the State of Alabama and in the other States of the Union, but in all cases said lines are so constructed and maintained as not to obstruct the navigation of such streams and the ordinary travel on such military and post roads. That the said telegraph company was, before and during said year, commencing March 15, 1883, and now is, engaged in the business of sending and receiving telegrams over said lines for the public between its said office in the port of Mobile and other places in other States and Territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the government of the United States, and their officers and agents, giving priority to said official telegraphic communications over all other business. And defendant avers that said official telegrams have been and are sent at rates which have been fixed by the postmaster general annually since the said 5th of June, 1867. And defendant avers that as the manager of said company, and in its name and under its direction and appointment, and in no other manner capacity, was he engaged in said telegraph business at the time and the manner as alleged in said complaint." To this plea a demurrer was filed and sustained by the court, and judgment was given for the plaintiff; and, on appeal to the Supreme Court of Alabama, this judgment was affirmed. The present writ of error is brought to review the judgment of the supreme court. That court adopted its opinion given on a previous occasion between the same parties, in which the circuit court had decided in favor of the defendant, and its decision was reversed. In that opinion the supreme court said: "The defense was that the ordinance is an attempt to regulate commerce, and violative of the clause of the constitution of the United States which confers on congress the 'power to regulate commerce with foreign nations and among the several States.'

The circuit court held the defense good, and gave judgment against the port of Mobile. Is the ordinance a violation of the constitution of the United States? We will not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain, and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in Osborne v. Mobile, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this. Joseph v. Randolph, 71 Ala. 499."

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county, and port of Mobile, on its poles, wires, fixtures, and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent. on their gross receipts within the State. The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of congress passed July 24, 1866, and other acts incorporated in title 45 of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business. Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and, if carried on between different States, and directly within the power of regulation conferred upon congress, and free from the control of State regulations, except such as are strictly of a police character. In the case of Telegraph Co. v. Telegraph Co., 96 U. S. 1, we held that it was not only the right, but the duty, of congress to take care that intercourse among the States and the transmission of intelligence between them be not obstructed or unnecessarily incumbered by State legislation; and that the act of congress passed July 24, 1866, above referred to, so far as it declares that the erection of telegraph lines shall, as against State interference, be free to all who accept its terms and conditions, and that a telegraph company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is also appropriate legislation to execute the powers of congress over the postal service. In Telegraph Co. v. Texas, 105 U. S. 460, we decided that a State cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce, and that, if the company accepts the provision of the act of 1866, it becomes an agent of the United States, so far as the business of the government is concerned; and State laws are unconstitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another. In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. It comes plainly within the principle of the decisions lately made by this court in Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, and Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118. It is parallel with the case of Brown v. Maryland, 12 Wheat. 419. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on (the importation of goods from foreign countries), and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the constitution which prohibits the States from laying any duty on imports. The Maryland act which was under consideration in that case declared that "all importers of foreign articles or commodities," etc., "and all other persons selling the same by wholesale," etc., "shall, before they are authorized to sell, take out a license, * * * for which they shall pay fifty dollars," etc., subject to a penalty for neglect or refusal. Chief Justice Taney, referring to the case of Brown v. Maryland, in Almy v. State of California, 24 How. 169, 173, in which it was decided that a State stamp tax on bills of lading was void, said: "We think this case cannot be distinguished from that of Brown v. Maryland. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the constitution now in question. * * * The opinion of the

court, delivered by Chief Justice Marshall, shows that (the case) was carefully and fully considered by the court. And the court decided that this State law (the Maryland law under consideration in Brown v. Maryland), and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance." But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company. The State court relies upon the case of Osborne v. Mobile, 16 Wall. 479, which brought up for consideration an ordiance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of $500; if the business was confined within the limits of the State, the license fee was only $100; if confined within the city, it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon congress to regulate commerce among the several States. A great number and variety of cases involving the commercial power of congress have been brought to the attention of this court during the past 15 years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that, in order to give full and fair effect to the different clauses of the constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the constitution in all its parts. In our opinion, such a construction of the constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference, we give the following list: Case of State Freight Tax, 15 Wall. 232; Telegraph Co. v. Telegraph Co., 96 U. S. 1; Mobile v. Kimball, 102 U. S. 691; Telegraph Co. v. Texas, 105 U. S. 460; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. Rep. 38; Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; Pikard v. Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635; Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118; Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. Rep. 1126; Ratterman v. Telegraph Co., *ante*, 1127. We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of Telegraph Co. v. Massachusetts, 125 U. S. 530, *ante*, 961. The result of the conclusion which we have reached is that the judgment of the Supreme Court of Alabama must be reversed, and the cause remanded, with instructions to reverse the judgment of the Mobile circuit court; and it is so ordered.

NOTE.—The cases are numerous, where the supreme court has been called on to construe the power given to congress to levy and collect duties and imposts and to regulate commerce with foreign nations and among the several States, and to prevent interference by the States.[1] The power of congress over interstate commerce is exclusive, whenever the matter is national in its character, or admits of a uniform system or plan of regulation.[2] Among such matters are included the transportation of passengers or merchandise from one State to another, or to or from foreign nations, or communication by telegraphic messages between persons in different States, for the courts will take into consideration all new agencies for carrying on commerce.[3] When congress has taken no action in the matter, it has thereby impliedly expressed its will, that all such commerce shall remain entirely untrammeled.[4] The scope of congressional power is best illustrated by a reference to the decisions overruling State legislation.

Invalid State Acts—Taxation.—The following State laws have been held invalid, viz: a tax on the gross

[1] U. S. Const. art. 1, § 8.

[2] Brown v. Houston, 114 U. S. 622; Henderson v. Mayor, 92 U. S. 259; Crandall v. Nevada, 6 Wall. 35; Robbins v. Shelby Co. Tax Dist., 120 U. S. 489; State Freight Tax., 15 Wall. 232; Cooley v. Port Wardens, 12 How. 299.

[3] Telegraph Co. v. Telegraph Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460.

[4] Welton v. Missouri, 91 U. S. 275; Phila. & S. S. Co. v. Pennsylvania, 122 U. S. 326; Walling v. Michigan, 116 U. S. 446; Brown v. Houston, 114 U. S. 622; Gloucester F. Co. v. Pennsylvania, 114 U. S. 196.

receipts of a corporation, incorporated in that State, which receipts are derived from transportation of persons and property by sea between the State and from and to foreign countries;[5] a tax on the gross receipts of a railroad, derived from the carriage of passengers and freight into, out of, or through the State;[6] a State law to regulate, or tax, or impose any restriction on the transmission of persons or property or telegraphic messages from one State to another, even as to the part of such transmission as may be within the State;[7] a license tax on importers, who sell by wholesale goods imported from foreign countries which are still in the orignal package;[8] a tax on goods imposed after their transit to another State has commenced;[9] a tax on freight brought into a State, or taken up there and carried out of the State;[10] a tax on the gross receipts of a telegraph company doing an interstate business, but such tax was held void only in proportion to the extent that such receipts were derived from interstate commerce;[11] where a telegraph company was authorized to construct its lines along military or post-roads, and had accepted the provisions of the act of congress of 1866, it was held, that it could not be enjoined from doing business by a State, because it had failed to pay its local taxes;[12] a tax on stage-coaches or railroads of $1 on every passenger carried through the State or out of it;[13] a tax of $50 on every sleeping car run over the railroads of a State, not owned by such railroad, was held invalid, so far as it concerned the transportation of persons into, out of, or through the State;[14] an ordinance requiring persons running boats from the city of New Orleans to the Gulf of Mexico to pay a license;[15] a tax on sales made by an auctioneer of imported goods in the orignal packages for the benefit of the importer;[16] a tax on those soliciting, and making sales of intoxicating liquors to be shipped from out of the State, where no such tax is imposed on those selling such liquors manufactured in the State;[17] an ordinance requiring all drummers, who have not a licensed house of business in that city, to pay so much per week or month for the privilege of selling;[18] a law that peddlers should take out licenses, and only those were to be deemed peddlers who dealt in articles not of State growth or manufacture;[19] a city ordinance imposing heavier wharfage dues on vessels carrying the products of other States than on those carrying the products of the home State;[20] a law requiring a license involving a specific tax on agents selling goods manufactured in other States, when such license was not required if such parties sold articles manufactured in that State;[21] interstate commerce cannot be taxed at all by a State, even though the same amount of tax is laid on domestic commerce, or that which is carried on solely within the State;[22] a State law is invalid, which requires vessels arriving from foreign ports to give bond, that no passenger landed therefrom shall become a burden on the State, or in default thereof to pay a fixed sum for every passenger;[23] a State law, requiring telegraph companies to deliver by messenger all dispatches received, which are addressed to parties living within a mile of the receiving station, is invalid so far as it relates to deliveries in other States;[24] a State law is invalid, which prohibits the driving of certain breeds of cattle through the State during certain months of the year.[25]

Valid State Action.—State laws are valid relative to such matters within a certain range, and since the presumption is in favor of the legality of any legislative act, those impeaching it must show its invalidity.[26] As to those matters, which are local or limited in nature or sphere of operation, the State may prescribe regulations till congress assumes control of them.[27] It is elsewhere said, that the States can only interfere by virtue of their police power.[28] In the absence of congressional legislation the States may continue to regulate matters of local interest, only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls and freight,[29] and warehouses.[30] Under this construction, a law was held valid, which provided, that in case a vessel neglected or refused to hire a pilot, it should forfeit and pay to the master warden of the port for the use of the society for the relief of distressed and decayed plots, their widows and children, one-half of the regular amount of pilotage.[31] The charges for wharfage in a State law may be graduated by the tonnage of the vessels using the wharf, if the charge is not unreasonable.[32] Sometimes such laws have been upheld, when applied to local corporations, as being matter of contract. A provision, that a railroad should pay the State of its incorporation a portion of its earnings, was sustained, since it was so provided in its charter, though the corporation was engaged in interstate commerce, and such payment operated as a tax thereon.[33] In the absence of congressional action a State can prescribe maximum charges for the transportation of freight brought from without into the State, or received within and carried outside, when in the charter of the railroad the State reserved the power to alter or amend it, or to regulate the railroad.[34] The subjects included within the police power of the States are almost infinite, but no State can be allowed to encroach thereby on the free exercise by congress of the power vested in it.[35]

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[5] Phila. & S. S. Co. v. Pennsylvania, *supra*.
[6] Fargo v. Michigan, 121 U. S. 230.
[7] Wabash, etc. R. R. v. Illinois, 118 U. S. 557.
[8] Brown v. Maryland, 12 Wheat. 419.
[9] Coe v. Errol, 116 U. S. 517; Brown v. Houston, 114 U. S. 622.
[10] State Freight Tax, 15 Wall. 232.
[11] Ratterman v. Western U. T. Co., 8 S. C. Rep. 1127.
[12] Western U. T. C. v. Massachusetts, 8 S. C. Rep. 961.
[13] Crandall v. Nevada, 6 Wall. 35.
[14] Pickard v. Pullman S. C. Co., 117 U. S. 34.
[15] Moran v. New Orleans, 112 U. S. 69.
[16] Cook v. Pennsylvania, 97 U. S. 566.
[17] Walling v. Michigan, 116 U. S. 446.
[18] Robbins v. Shelby Co. Tax Dist., 120 U. S. 489.
[19] Welton v. Missouri, 91 U. S. 275.
[20] Guy v. Baltimore, 100 U. S. 434.
[21] Webber v. Virginia, 103 U. S. 344.
[22] Robbins v. Shelby Co. Tax Dist., *supra*.
[23] Henderson v. Mayor, 92 U. S. 259.
[24] Western U. T. Co. v. Pendleton, 122 U. S. 347.
[25] Railroad Co. v. Husen. 95 U. S. 465.
[26] Brown v. Maryland, *supra*.
[27] Gloucester F. Co. v. Pennsylvania, *supra*.
[28] Robbins v. Shelby Co. Tax Dist., *supra*.
[29] Brown v. Houston, 114 U. S. 622.
[30] Munn v. Illinois, 94 U. S. 113.
[31] Cooley v. Board of Wardens, 12 How. 299.
[32] Onachita P. Co. v. Aiken, 121, U. S. 444.
[33] Railroad Co. v. Maryland, 88 U. S. 456.
[34] Peik v. Chicago & N. W. R. R., 94 U. S. 164.
[35] Western U. T. Co. v. Pendleton, *supra*.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCOUNT STATED — What is. —— A signed the following memorandum: On my return I will settle the above account. The last item was indorsed,—to be investigated as to amount: *Held*, that the amount became stated as to the admitted amount, and on an account stated plaintiff could recover only that amount. — *Tuggle v. Minor*, S. C. Cal., May 7, 1888; 18 Pac. Rep. 131.

2. ANIMALS— Adoption of Stock Law — Validity. —— Under Georgia law, the building of a fence around a militia district provided for in Code Ga., §1455 is not a condition precedent to the operation of the law after it has been adopted by vote. — *Dover v. State*, S. C. Ga., May 16, 1888; 6 S. E. Rep. 539.

3. APPEAL—Appellant—Reversal.——When no appeal is taken from a decree by the party against whom it is entered, it will not be reversed on the appeal of the adverse party for errors in his favor. — *Saunders v. McLean*, S. C. Miss., April 30, 1888; 4 South. Rep. 299.

4. APPEAL— Assignment of Error.—— An assignment of error, so vague in its terms that its meaning is uncertain, will not be considered on appeal.— *Roberts v. State*, S. C. Ga., May 14, 1888; 6 S. E. Rep. 587.

5. APPEAL—Bond—Practice.—— Under the statute of New York, the objection of insolvency of the surety for appeal must be taken in the courts from which such appeal is prayed. After the appeal is perfected the court of appeals will not entertain a motion to dismiss on that ground. — *Parks v. Murray*. N. Y. Ct. App., April 17, 1888; 16 N. E. Rep. 485.

6. APPEAL—Dismissed.—— Where a judgment is rendered and an appeal taken upon stipulation that no order for sale shall be issued in another case between the same parties until the determination of the appeal, the dismissal of the appeal by the appellant, who was defendant in both actions, renders both judgments enforceable.—*Root v. Burton*, S. C. Ind., May 28, 1888; 17 N. E. Rep. 194.

7. APPEAL—Dismissal— Affidavits.—— An appeal in a foreclosure case will not be dismissed on affidavits, that appellant stated the appeal was for delay, that the bond is insufficient, the property is decreasing in value, and by reason of non-insurance is liable to sustain further deprecation; nor will the case be advanced for a hearing.—*Gregory v. Keating*, S. C. Cal., May 22, 1888; 18 Pac. Rep. 389.

8. APPEAL—Entry of Judgment—Nunc Pro Tunc.—— Rights of parties in respect to an appeal are determined by the date of the actual entry of the judgment, and cannot be affected by entry of judgment *nunc pro tunc* as of prior date.—*Coon v. Grand Lodge*, S. C. Cal., May 31, 1888; 18 Pac. Rep. 384.

9. APPEAL—Filing Return— Dismissal—Reinstatement. ——The clerk of the supreme court properly dismisses an appeal, when the case prepared on application for a new trial addressed to the circuit court is not filed in the supreme court in the time allowed. When the failure to file was due to the belief that the case prepared for argument in the supreme court constituted a part of the judgment roll, it is proper to reinstate the appeal. — *Tribble v. Poor*, S. C. S. Car., May 14 1888; 6 S. E. Rep. 577.

10. APPEAL — Findings — Review. —— The finding of the district court on a matter of fact, when the evidence is conflicting, has the effect of a verdict, and will not be disturbed by the appellate court. — *Ferrell v. Seguin St. R. R.*, S. C. Tex., May 8, 1888; 8 S. W. Rep. 486.

11. APPEAL—Injunction—Evidence De Hors the Record. ——A railroad appeal from an award of arbitrators for land taken for its use, and pending the appeal was enjoined from taking the land until payment of damages, from which order it prosecuted a writ of error: *Held*, that the supreme court would hear evidence that the injunction was dissolved by payment, though not contained in the record, though made under protest.—*Atlanta & F. R. R. v. Blanton*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 584.

12. APPEAL—Injunction— Practice. —— Upon appeal from a decree dismissing a bill for an injunction to restrain the execution of an ordinance for paving a street, the supreme court will act on the record as it came up, and will not consider affidavits to the effect that, since the appeal was taken, the paving has been completed. —*Dennison v. City of Kansas*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 429.

13. APPEAL — Jurisdictional Amount. —— A deed for $400 with interest, in all not amounting to $500, cannot be appealed, though in default of payment the sale of certain land is ordered.—*Cook v. Bondurant*, S. C. Ap. Va. May 17, 1888; 6 S. E. Rep. 618.

14. APPEAL — Notice. —— Under Iowa law, written notice of an appeal must be served upon the adverse party or his attorney and upon the clerk of the court below, and when the record fails to show such service the supreme court has no jurisdiction.—*Michel v. Michel*, S. C. Iowa, May 31, 1888; 38 N. W. Rep. 422.

15. APPEAL—Notice — Attorneys. —— It is no ground for dissmissing an appeal, that the notice of appeal was signed by different attorneys from those retained in the lower court. — *Shirley v. Burch*, S. C. Oreg., Jan. 16, 1888; 18 Pac. Rep. 344.

16. APPEAL—Practice.—— The law court will not entertain a case reported from a superior court, unless the report is signed by the justice of the latter court.— *Blodgett v. Dow*, S. J. C. Me., Jan. 30, 1888; 13 Atl. Rep. 580.

17. APPEAL—Refusing new Trial—Orders. —— An order refusing a new trial, and dismissing the motion therefor being appealable, an order refusing to set aside said order is not appealable.— *Larkin v. Larkin*, S. C. Cal., May 29, 1888; 18 Pac. Rep. 296.

18. APPEAL—Review— Objections Raised. —— Where respondents attorney signed the settled statement on motion for a new trial, it will be presumed that he waived all objections to the hearing of the motion on the ground that notice thereof had not been given. — *Cockill v. Hall*, S. C. Cal., May 19, 1888; 18 Pac. Rep. 318.

19. APPEAL — Service of Notice — Affidavit. —— An affidavit of service of notice of appeal, which states that affiant alleges and believes that he served the notice, is fatally defective; so if it is served by mail, when it does not allege that the parties resided or had their offices at different places or that there was mail communication between the two places. — *Pacific M. L. I. Co. v. Shepardson*, S. C. Cal., May 31, 1888; 18 Pac. Rep. 398.

20. APPEAL—Time of Taking.——When no motion for a new trial is made and the appeal is not taken within 60 days from the rendition of final decree, the sufficiency of the evidence to justify the final or a previous interlocutory decree will not be considered. — *Thompson v. White*, S. C. Cal., June 1, 1888; 18 Pac. Rep. 399.

21. APPROPRIATIONS—Authority of Executive—Claims. ——When an appropriation has been made by congress for a general purpose, contemplating a number of acts to be done by the executive department, its agency is general within those limits, and when persons in good faith act under the orders of the department, the burden of proof of excess of authority is upon the government, when the facts are peculiarly within its knowledge, and the creditor was not in circumstances to ascertain them.—*Leavitt v. United States*, U. S. D. C. (N. Y.), March 29, 1888, 34 Fed. Rep. 623.

22. ARBITRATION — Award. —— An award must contain a distinct determination of the point submitted, to be conclusive upon the parties. — *Walker v. Simpson*, S. J. C. Me., Jan. 30, 1888; 13 Atl. Rep. 580.

23. ASSIGNMENT—Judgment—Consideration.——Where it appears that A assigned a judgment to B, the consideration therefor being certain demands between them, that subsequently A, sued B, who set up a counterclaim, but gave no credit for said judgment, such facts show that B gave no consideration for the assignment.—*Hamil v. McIlroy*, S. C. Cal., May 29, 1888; 18 Pac. Rep. 377.

24. ASSIGNMENT— Personal Contracts. —— A agreed to deliver to 50 tons of ore a day to the firm of B and E, said ore to belong to the latter so soon as delivered, and to be afterwards paid for on assays made: *Held*, that the contract was personal, and the plaintiff claiming as assigned thereof could not compel A, to continue to deliver ore.—*Arkansas S. Co. v. Belden M. Co.*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1368.

25. ASSUMPSIT—Privity— Payment to Attorney. ——No privity exists between the attorney who prosecuted a suit and collected the money and the defendant, to support an action of assumpsit for its recovery after the reversal of the judgment. — *Green v. Brengle*, S C. App. Va., May 10, 1888; 6 S. E. Rep. 603.

26. ASSUMPSIT — Services. —— Where a man and woman illegally cohabitated for a number of years, the woman cannot after their separation recover for domestic services performed by her during that period.— *Brown v. Tuttle*, S. J. C. Me., Feb. 6 1888; 13 Atl. Rep. 583.

27. ATTACHMENT—Intervention — Burden of Proof.—— The burden of proof as to the right of property is on the intervenor in an attachment suit upon a trial of that issue.—*Wallace v. Robeson*, S. C. N. Car., May 18, 1888; 6 S. E. Rep. 650.

28. ATTORNEY—Executor—Action.—— Circumstances stated under which it was held that a claim of an attorney for services rendered in a lunacy case, which was cut short by the death of the alleged lunatic, could not be allowed pending an action respecting the estate of the deceased instituted by the executor. — *Appeal of Freeman*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 552.

29. BAIL — Charge of Murder. —— A woman and her son, who had dispossessed A's tenant from a house, were in the evening forcibly expelled therefrom and led off by two masked men and a few days afterwards found murdered, and A was arrested therefor and refused bail, though he proved an *alibi* by several witnesses: *Held*, that A was entitled to bail. — *Ex parte Gallaher*, Tex. Ct. App. May 28, 1888; 8 S. W. Rep. 481.

30. BANKS — National — Insolvency — Preference by Stockholder.——A mortgage of all his individual property, executed by a cashier and stockholder of an insolvent national bank, after it had closed its doors to secure a depositor, amounts to a preference, and is void against a judgment recovered against the cashier by the receiver, either in the hands of the receiver or in those of a purchaser from him for value.—*Gatch v. Fitch*, U. S. C. C. (Ind.), Feb. 2, 1888; 34 Fed. Rep. 566.

31. BILLS AND NOTES—Construction — Parol Evidence. —— A note reading, we promise to pay, and signed Peninsular Cigar Co., Geo. Moebs, Sec. & Treas., and indorsed Geo. Moebs, Sec. & Treas., is umambiginous, and in terms the note and indorsement of the company, and parol evidence is not admissible to show that the indorsement was intended to be that of Moebs personally.—*Falk v. Moebs*, U. S. S. C., May 16, 1888; 8 S. C. Rep. 1319.

32. BOUNDARIES—Deed—Navigable Stream.— A patent calling to run with the meanders of the Cumberland river passes title to the bed of the river to the middle of the stream, unless the grant expressly limits it to the margin water to the middle of the stream, subject to the public assessment of navigation, and to the usufractory rights of other proprietors above and below — *Kentucky L. Co. v. Green*, Ky., Ct. App., May 12, 1888; 8 S. W. Rep. 439.

33. BROKERS—Real Estate — Commission. —— A real estate broker found a purchaser for land, and the owner and the purchaser entered into a written contract relative thereto, but the purchaser was to have time to examine the title; the purchaser made a groundless objection to the title, which was good, but the owner did not sue for specific performance: *Held*, that the broker was entitled to his full commissions.—*Parker v. Walker*, S. C. Tenn., May 5, 1888; 8 S. W. Rep. 391.

34. CARRIERS—Passengers—Conditional Ticket.——A sold B a ticket to a point beyond its line and return, conditional that A was not responsible beyond its line, and that it was not good for a return unless it was properly stamped at the end of the line. B presented himself at the appointed place to have his ticket stamped, but no agent was present to stamp the ticket. Upon his return B was ejected from A's cars, because his ticket was not stamped: *Held*, that A was under no obligation to accept the ticket till it was properly stamped.— *Mosher v. St. Louis, etc., R. R.*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1324.

35. CARRIER—Passenger—Personal Injuries. —— Circumstances stated under which a passenger injured while passing from one car to another of a moving train cannot recover damages for personal injuries. — *Stewart v. Boston, etc. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 466.

36. CHATTEL MORTGAGE—Waiver. —— Circumstances stated under which the mortgagee of chattels was held to have waived his right of taking possession of the chattels upon their removal from the premises by the mortgagor.—*Grinlee v. Rockhill*, S. N. J. Ct. Chan., April 6, 1888; 13 Atl. Rep. 609.

37. CLERK—Court.—— Where a prothonotary fails to deposit public money in the bank designated by the court, he and his sureties are liable therefor, although the parties entitled to that money have been paid out of other money under the control of the court.—*Yohe v. Commonwealth*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 546.

38. COLLISION — Tows — Narrow Channel. —— Two steamers approaching each other in a narrow channel collided, and both were held to be in fault, one for occupying the wrong side of the channel, and the other for attempting to pass too near the other, knowing the danger of a collision from the set of the current.—*The Belle*, U. S. D. C. (N. Y.), March 26, 1888; 34 Fed. Rep. 669.

39. COMPOSITION WITH CREDITORS — Tender. —— A composition agreement with creditors to accept 50 per cent. in full of their claims is not carried out by notifying the creditors, that it will be paid by a bank upon their depositing with the bank receipts in full satisfaction of the debts.—*Melhop v. Tathwell*, S. C. Iowa, May 31, 1888; 38 N. W. Rep. 420.

40. CONSTABLE— Unlawful Seizure — Action. —— In cases of claim and delivery, an action will lie to recover property taken from defendant by a constable without any right but by virtue of an affidavit, with the order indorsed thereon, and an undertaking. — *Laughlin v. Thompson*, S. C. Cal., May 25, 1888; 18 Pac. Rep. 330.

41. CONSTITUTIONAL LAW—Adulteration.——A statute prescribing inspection of milk offered for sale to prevent adulterations of such milk is not unconstitutional. —*State v. Campbell*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 585.

42. CONTEMPT — Lawful Process — Punishment. —— Punishment for contempt in failing to obey a wit of *habeas corpus* cannot, under North Carolina law, exceed imprisonment for 30 days and a fine of $250.—*In re Patterson*, S. C. N. Car., May 14, 1888; 6 S. E. Rep. 643.

43. CONTRACTS—Obligation— Railroad Grant. ——The Texas act, granting the Memphis & El Paso R. R., all vacant lands within 8 miles of its extension line was a contract, and was not affected by the Texas constitution of 1869, declaring such lands open to settlers.—*Houston, etc. R. R. v. Texas & P. R. R.*, S. C. Tex., May 8, 1888; 8 S. W. Rep. 498.

44. CORPORATIONS — Incorporation Tax — Benevolent Association.——Building and loan associations cannot be considered to be benevolent associations, and are not exempt from the incorporation tax under Const, Mo., art 10, § 21.—*State v. McGrath*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 425.

45. CORPORATION—Stock—Transfer. —— When a corporation has negligently canceled a member's stock and issued certificates thereof to a third person, who has purchased it from one not authorized to sell, the true owner may proceed directly against the corporation to compel it to replace his stock or pay him its value.—*St. Romes v. Levee S. C. P. Co.*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1335.

46. COST — Trustee Accounting. —— When a trustee refused upon the death of the *cestui que trust* to pay over the trust funds to his heirs because, as he alleged, there was an amount due to him for the expenses of the trust: *Held*, that when an accounting was compelled and it was found that his demad of $70,000 was reduced to $18,000, he was properly charged with the cost. — *Appeal of Taylor*, S. C. Penn., April 23, 1888; 13 Atl., Rep. 554.

47. COUNTY COMMISSIONERS. —— A board of county commissioners can be convened in special session by an oral notice given by the auditor.—*White v. Fleming*, S. C. Ind., March 29, 1888; 16 N. E. Rep. 487.

48. COURTS—Federal—Following State Laws.—— The laws of Missouri, relative to disclosing the testimony taken before a grand jury, is binding on the federal courts sitting in the State. — *Fotheringham v. Adams E. Co.*, U. S. C. C. (Mo.), April 12, 1888; 34 Fed. Rep. 646.

49. COURT—Judge.—— The presence of the law judge at the Camden county court is not necessary to render it a constitutional court. — *Engle v. State*, S. C. N. J., March 20, 1888; 13 Atl. Rep. 654.

50. COUNTIES—County Board— Purchasing Land.—— The act giving the county court authority in certain cases to erect court-houses at places other than county seats, confers the power to purchase the land therefor. —*Shiedley v. Lynch*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 434.

51. CRIMINAL LAW—Accomplice — Corroboration.—— Defendant was connected with the theft, for which he was indicted, independently of the testimony of an accomplice, only by testimony that one of the things stolen had been found in a place where it was probable he had hidden it: *Held*, that he was entitled to an instruction embodying the law of Kentucky (Crim. Code § 241), on the subject of corroboration of an accomplice. — *Taylor v. Com.*, Ky. Ct. App., May 26, 1888; 8 S. W. Rep. 461.

52. CRIMINAL LAW — Appeal—Felony. —— Construction of Illinois statutes relative to appeals and writs of error in criminal cases.—*Baits v. People*, S. C. Ills., Jan. 20, 1888; 16 N. E. Rep. 483.

53. CRIMINAL LAW—Appeal — Staying Remittitur.—— When an appellant in a criminal case moves for a stay of *remittitur*, with leave to move the court below for a trial, on the ground of newly-discovered evidence, at least a *prima facie* case must be made out in support of the motion.—*State v. Jacobs*, S. C. S. Car., May 14, 1888; 6 S. E. Rep. 577.

54. CRIMINAL LAW—Bail—Murder.—— Where defendant and deceased had a quarrel, resulting from defendant's fondness for deceased's wife, and upon meeting, after loud words they shot and deceased was killed, it being questionable who fired first, defendant is entitled to be released on bail.—*Ex parte Suddath*, Tex. Ct. App., May 9, 1888; 8 S. W. Rep. 479.

55. CRIMINAL LAW— Burglary— Possesssion of Stolen Goods. —— Proof that a house was burglariously entered, and certain articles stolen therefrom, which were soon after found in defendant's possession, who appropriated them to his own use and gave no explanation, will warrant a conviction. — *Morgan v. State*, Tex. Ct. App., June 2, 1888; 8 S. W. Rep. 487.

56. CRIMINAL LAW — Charge — Stenographer. —— Though a part of the charge in a murder case is addressed to the jury orally, which was not taken down by the stenographer, when the bill of exceptions shows that it did not differ materially from the report by the stenographer, there is no error, notwithstanding Pen. Code Cal. § 1093.— *People v. Cos.*, S. C. Cal., May 25, 1888; 18 Pac. Rep. 332.

57. CRIMINAL LAW — Conspiracy — Boycotting. —— Where parties combined to force a firm to employ only employees belonging to a certain union, and boycotted them and their employees, and advertised them in order to withdraw their trade and break down their business, such parties were guilty of a criminal conspiracy.—*Crump v. Com.*, S. C. App. Va., May 26, 1888; 6 S. E. Rep. 620.

58. CRIMINAL LAW — Description of Defendant. —— Under Texas law, a complaint and information describing the accused as one Pancho are fatally defective. — *Pancho v. State*, Tex. Ct. App., May 5, 1888; 8 S. W. Rep. 476.

59. CRIMINAL LAW—Description of Defendant.——Under Texas law, a complaint and information describing the accused as one Persqual are fatally defeective. — *Persqual v. State*, Tex. Ct. App., May 5, 1888; 8 S. W. Rep. 477.

60. CRIMINAL LAW— Embezzlement— Indictment.—— An indictment alleging that defendant embezzled from a company, of which he was an officer and the one who received its money, $500 lawful money of the United States, a more particular description of which could not be given, need not allege the kind of money, that it was current, or from whom it was received.—*Malcolmsom v. State*, Tex. Ct. App., March 17, 1888; 8 S. W. Rep. 468.

61. CRIMINAL LAW — Embezzlement—Ownership.—— Where an indictment for larceny after trust delegated charges, that the defendant having been intrusted by E with certain money to be applied to the use of B, to whom it belonged, but the proof shows that E was the agent of B, and delivered the money to the defendant and repeated to him the instructions of B, the evidence fails to sustain the indictment. — *McCrary v. State*, S. C. Ga., May 16, 1888; 6 S. E. Rep. 588.

62. CRIMINAL LAW — False Pretenses — Description of Property.——An indictment under Rev. St. Mo., § 1561, charged that defendant did obtain from E and P, her, his, and their property, to wit, certain real estate and personal property, the exact description of which is unknown to these grand jurors, of the value of $6,075, by means, etc., is fatally defective, as not stating the particular property. — *State v. Crooker*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 422.

63. CRIMINAL LAW—False Pretenses—Indictment.—— In an indictment for obtaining money by false pretenses, under Rev. St. Mo. 1879, § 1561, it is sufficient to charge the offense in the language of the statute. — *State v. Sarony*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 407.

64. CRIMINAL LAW—Homicide—Self-defense.——One who voluntarily provokes or enters into a difficulty brought on by any unlawful act of his, resulting in the death of another, cannot justify on the ground of self defense.—*State v. Hardy*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 416.

65. CRIMINAL LAW— Juror — Competency. —— When the trial judge finds as a fact that a juror objected to by defendent for cause is indifferent and competent, such finding is not reviewable in the appellate court. — *State v. Potts*, S. C. N. Car., May 18, 1888; 6 S. E. Rep. 657.

66. CRIMINAL LAW—Larceny— Evidence. —— Conviction of theft of corn, in the total absence of proof of its value, will be set aside. — *Ellison v. State*, Tex. Ct. App., April 7, 1888; 8 S. W. Rep. 462.

67. CRIMINAL LAW—Larceny — From the Person. —— Defendant snatched money from A's vest pocket and offered to bet with it; they stood at arm's length conversing for about ten minutes, when, after taking a drink, A asked for his money: *Held*, that under Pen. Code Tex. art. 727, the evidence did not warrant a conviction for theft from the person. — *Graves v. State*, Tex. Ct. App., April 4, 1888; 8 S. W. Rep. 471.

68. CRIMINAL LAW—New Trial—Time Allowed.——On an indictment for carrying concealed weapons a new trial will not be allowed on the ground that defendant did not have time to prepare his defense, when he was allowed one hour after the case was called, and no further time was asked, nor reason assigned why he was not ready.—*Parker v. State*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 600.

69. CRIMINAL LAW— Possession of Stolen Goods — Explanation.——Defendant, being found in possession of stolen goods, explained his possession, and introduced evidence tending to corroborate his statements. The State offered no evidence in reply thereto: *Held*, that a conviction for larceny could not be sustained.—*Tavin v. State*, Tex. Ct. App., May 2, 1888; 8 S. W. Rep. 473.

70. CRIMINAL LAW—Rape— Indictment. —— In an indictment under Mill's Code, § 1743 for assault with intent to commit rape, it is sufficient to charge that the act was done violently, etc.—*State v. Daly*, S. C. Oreg., April 19, 1888; 18 Pac. Rep. 357.

71. CRIMINAL LAW—Trial— Sentence. —— Under Missouri law, a sentence on a trial and conviction for murder, passed by a circuit judge who had not tried the cause, at the request of the regular judge of the court in which the cause was pending, the latter having been prosecuting attorney at the trial, is unauthorized and *coram non judice*.—*State v. Shea*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 409.

72. CRIMINAL LAW — Verdict—Penalty. —— It is error to instruct a jury, that upon conviction for gaming they must assess a fine, under Code Ala. 1886, § 4500. — *Bibl v. State*, S. C. Ala., May 24, 1888; 4 South Rep. 275.

73. CRIMINAL LAW— Witness — Impeaching. —— Evidence was introduced to show that a witness made different statements from those made in court: *Held*, that instructions should limit the consideration of such evidence by the jury to the consideration of the credibility of the witness.— *State v. Davis*, S. C. Iowa, June 1, 1888; 38 N. W. Rep. 424.

74. CUSTOMS DUTIES — Valuation — Construction of Law.——The law, that in determining the value of imports there shall be added the cost of transportation from the place of growth or manufacture to the place of shipment, does not apply when the article is produced in one country, but is shipped to the United States from another country. — *Robertson v. Downing*, U. S. S. C., May 16, 1888; 8 S. C. Rep. 1328.

75. DAMAGES—Exemplary— Ratification of Levy.—— A married woman was injured by the officers in making a levy upon her husband's exempt property: *Held, that* if the levy was oppressively made, and the conduct of the officers was malicious and oppressive to her and the creditor with knowledge of the facts and the injury, ratified the acts of the officers, and his acceptance of any benefit from the levy with knowledge of the facts is a ratification, he and they would be liable in exemplary damages. — *Brown v. Bridges*, S. C. Tex., May 8, 1888; 8 S. W. Rep. 502.

76. DEED—Filling in Grantee's Name — Agent. —— A mortgage with the name of the mortgagee left blank cannot be rendered valid by the insertion of the name by an agent, to whom the mortgagor delivered the mortage with power to borrow the money and obtain money thereon from whomsoever he could. — *Shirley v. Busch*, S. C. Oreg., Feb. 13, 1888; 18 Pac. Rep. 351.

77. DESCENT AND DISTRIBUTION — Refunding Bonds — Executor. —— Construction of Pennsylvania statutes relative to the distribution of the estates of descendants; the refunding bonds to be given by the distributees. Circumstances under which an executor is not liable for property so distributed.—*Appeal of Schaifer*, S. C. Penn., April 16, 1888; 13 Atl., Rep, 507.

78. DISTRICT OF COLUMBIA — Contracts — Rejection of Claims. —— A company made verbal propositions to the vice-president of the board of public works of the District of Columbia for laying street pavements and received a writing, signed by the secretary of the board, reciting and accepting its proposition: *Held*, that the alleged contract did not meet the requirements of act of Feb. 21, 1871, § 37. When the board of audit passes upon a claim for a breach of contract with the board of public works of the District of Columbia and marks it disallowed, it is the same as rejected, under act of June 16, 1880, § 8.—*Brown v. District of Columbia*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1314.

79. DIVORCE—Cruelty—Children—Support.——Where for years a husband has used coarse, vulgar and insulting language toward his wife, beating her and threatening her with serious bodily harm, a decree for divorce from bed and board with the custody of the children should be granted to her. Where her separate property is larger than the husband's and sufficient for the support of herself and child, the husband should not be compelled to contribute to their support. — *Myers v. Myers*, S. C. App. Va., Sept. 15, 1887; 6 S. E. Rep. 630.

80. DURESS—Instructions. —— Circumstances stated under which it was held upon a trial upon a bond which it was alleged was obtained by duress, that the instruction was properly given to the jury, that if it appeared to them that the bond was obtained by duress they should find for defendant. — *Avery v. Layton*, S. C. Penn., April 16, 1888; 13 Atl. Rep. 528.

81. EJECTMENT—Improvements—Judgment ——Where in ejectment defendant claims for improvements made in good faith, believing his title to be good, and judgment is rendered against him ignoring his claim, such judgment is *res adjudicata* as to such claim.— *Casey v. Cooper*, S. C. N. Car., May 19, 1888; 6 S. E. Rep. 653.

82. EJECTMENT — Possession. —— When plaintiff's grantor had actual possession of land and inclosed it with a substantial fence and conveyed it to plaintiff, the latter, though never himself in actual possession but cultivating a part of it through his employees, may maintain ejectment against an intruder on any part of it.—*Dodge v. Yates*, S. C. Cal., May 23, 1888; 18 Pac. Rep. 323.

83. ELECTIONS— Corruption — Judges. —— A charge that a judge, while a candidate for office, agreed for a valuable consideration to appoint P, clerk of the court in case of his election, is not sustained by evidence of a conspicious loan of money to P, by W, for the use of the candidate, when both P and the candidate testify that the former's only connection with the transaction was as surety for the latter. — *People v. Goddard*, S. C. Colo., April 23, 1888; 18 Pac. Rep. 338.

84. EMBEZZLEMENT. —— The disclosures made before the judge of probate, relative to embezzlement of estates of the deceased persons are competent evidence in fuller proceedings to recover of the party of making such disclosures the amount so embezzled. — *Dunbar v Dunbar*, S. J. C. Me., June 31, 1888; 13 Atl. Rep. 578.

85. EMINENT DOMAIN—Highways—Compensation.—— A road of the third-class was laid out over land, which

A, subsequently purchased. Thereafter the commissioners declared it a road of the second class and ordered the gates removed; which had been erected at the entrances to A's land: *Held*, that A was entitled to compensation. — *Wooldridge v. Eastland Co.*, S. C. Tex. May 11, 1888; 8 S. W. Rep. 503.

86. ESTOPPEL—In Pais—Agent.—— A was authorized by B to represent him in suits to sell his land, which fact was known to plaintiffs, B's heirs, and they did not after B's death revoke or question A's authority during the pending of the suits, they are stopped after a sale has taken place, from settling up the agent's want of authority, and that, as they were not properly made parties, the sale is void.— *Marrow v. Brinkley*, S. C. App. Va., May 17, 1888; 6 S. E. Rep. 605.

87. EQUITY—Protection Against Fraud—Receiver.—— A sold goods to B on his representation, which A found were fraudulent and thereupon rescinded the sale. B had given a chattel mortgage to parties in another State: *Held*, that A could resort to equity and the court might appoint a receiver, plaintiff having given bond to hold the property in *statu quo* till a jury passed on the case. —*Wolfe v. Clafin*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 599.

88. EVIDENCE—Hearsay — Surveyor.—— A surveyor making a private survey made numerous declarations as to its identity with the lines and corners of the original survey, which he did not make: *Held*, that such declarations was merely hearsay, although the surveyor had died before the trial.—*Russell v. Hunnicutt*, S. C. Tex., May 8, 1888; 8 S. W. Rep. 500.

89. EVIDENCE—Negligence—Physician.——In an action against a physician for negligence and incompetency in the treatment of plaintiff, evidence that he obtained his certificate from the State board of examiners by means of diplomas irregularly obtained, and his statements concerning such diplomas are irrelevant.— *Bute v. Potts*, S. C. Cal., May 28, 1888; 18 Pac. Rep. 329.

90. EXECUTION—Agreement to Revive—Priority.—— An execution in favor of A was returned satisfied, but afterwards a mistake of $100 was discovered, and at the next term of court it was revived for $100. The sheriff gave his note therefor and took a transfer of the writ as security. The sheriff had signed two notes for $100 each as part of the payment when the writ was first satisfied. He procured an agreement from the execution debtor that the writ might be enforced for $300: *Held*, that the sheriff could claim only $100 out of the proceeds of defendant's property, and the junior judgments were entitled to the remainder.—*Satterfield v. Boyd*, S. C. Ga., May 7, 1888; 6 S. E. Rep. 583.

91. EXECUTORS—Purchase — Devisee — Trust.—— An executor who, at a foreclosure sale under a mortgage given by one of the devisees of her interest in the testator's estate, purchases the same for himself, there being no trace of fraud in the matter, does not hold the property in trust for her.—*Allen v. Gillette*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1331.

92. EXECUTOR AND ADMINISTRATOR — Power.——An executor may assign a mortgage of real estate held by the testator at the time of his decease, without a license from the probate court.—*Libby a. Mayberry*, S. J. C. Me., Feb. 1, 1888; 13 Atl. Rep. 577.

93. EXTRADITION—Forgery—Printed Theater Tickets. ——A printed theater ticket in the usual form and stamped upon its face with an inscription in the style of a seal setting out the name of the manager in printed characters is the subject of forgery, under the common law and under our treaty with Mexico. When the documentary evidence submitted on the hearing of an application for extradition is not accompanied by a certificate from our principal diplomatic agent residing there that the papers are legally authenticated, oral proof thereof may be offered, and an attorney of long practince in such country is a competent witness thereof.— *In re Benson*, U. S. C. C. (N. Y.), April 9, 1888; 34 Fed. Rep. 649.

94. FACTORS—Advances.——Where a factor receives goods for sale and makes advances upon them, receiving instructions not to sell below stated prices, and nevertheless sells at prices which do not bring as much as the money he had advanced, the consignor is not liable for the defficiency.—*Watson v. Baetty*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 521.

95. FRAUD—Deed—Husband and Wife.——In an action for damages forfalse representations as to the boundaries of real estate sold by defendant to plaintiff, the defendant's wife, who only executed the deed to bind her dower and had no knowledge of what transpired in connection with the sale, cannot be recovered against.— *Ramsey v. Wallace*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 638.

96. FRAUD — Judgment Note — Consideration.—— A gave his note to B, with an agreement allowing an attorney's fee at 10 per cent. interest if the note was sued on, for his debt to A and another debt to C, which A assumed: *Held*, that the note was not fradulent as to other creditors.—*Mack v. Block*, S. C. Tex., May 8, 1888; 7 S W. Rep. 495.

97. FRAUDS—Statute of—Debt of Another—Surety.—— A promise by a surety on an official bond to indemnify another surety, who becomes such at the request of the promisor, is within the statute of frauds and must be in writing.—*Wolverton v. Davis*, S. C. App. Va., May 24, 1888; 6 S. E. Rep. 619.

98. GUARDIAN AND WARD—Sale of Realty—Public Policy.——A agreed to convey the interest of his wife and children in certain property. A had himself appointed their guardian, and procured an order for the sale of their property, and the wife bought at such sale. All this was done to carry out A's agreement: *Held*, that the sale was contrary to public policy and carried no title. —*Rome L. Co. v. Eastman*, S. C. Ga., May 14, 1888; 6 S. E. Rep. 586.

99. HUSBAND AND WIFE.——Under the laws of New Hampshire, a wife may pledge her credit to pay for medical services rendered to her husband.—*Parsons v. McLane*, S. C. N. H., March 16, 1888; 13 Atl. Rep. 588.

100. HUSBAND AND WIFE—Judgment of Separation—Creditors.——Creditors, whose claims arose subsequent to a judgment of separation of property between husband and wife, cannot contest the correctness or validity of such judgment, except at least for absolute nullities.— *Brown v. Smyth* S. C. La., March 5, 1888; 4 South. Rep. 300.

101. HUSBAND AND WIFE—Separate Estate—Acknowledgment.——Under Ohio and Virginia law, a conveyance by a husband and wife of her estate, acknowledged by her, is ineffectual to pass her estate, unless the husband during her lifetime acknowledges it in the form prescribed by law.—*Sewall v. Haymaker*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1368.

102. INJUNCTION—RESTRAINING—TRESPASS.—— Injunction will lie to restrain A from using sacks owned and prepared by a rival in the same business for its own use in carrying on the business of buying and selling cotton seed, the owner having frequently objected to such use. —*Warren Mills v. New Orleans S. Co.*, S. C. Miss., April 23, 1888; 4 South. Rep. 298.

103. INSURANCE—Accident—Suicide—Presumption. —— A policy of accidental insurance provided, that it should not extend to any case of death or personal injury, unless it was established by direct and positive evidence, that such death or injury was caused by external violence and accidental means. The insured was found dead with a pistol bullet through his heart: *Held*, that the law would presume that the death was unintentional on the part of the insured, within the meaning of the policy.—*Traveler's Ins. Co. v. McConkey*, U. S. S. C. May 14, 1888; 8 S. C. Rep. 1360.

104. INSURANCE—Proof of Loss—Waiver of Condition. ——An insnrance company which refuses to pay a loss, because of an alleged avoidance of the policy by additional insurance without its consent, waives necessity for preliminary proofs according to the requirements of the policy.—*Phœnix Ins. Co. v. Spiers*, Ky. Ct. App., May 24, 1888; 8 S. W. Rep. 453.

105. INTOXICATING LIQUORS—Contempt—Certiorari.—A writ *of certiorari* to a judgment of contempt for violation of an injunction, under the Iowa prohibitory legislation, will not be granted, when relief is sought on the sole ground of the unconstitutionality of such legislation.—*Jordan v. District Court*, S. C. Iowa, June 8, 1888; 38 N. W. Rep. 430.

106. INTOXICATING LIQUORS—Illegal Sale—Indictment.—An indictment, which charges the sale of intoxicating liquors by the measure less than a gallon, to-wit, by the quart, is fatally defective, under acts N. C. 1885, ch. 175, § 34, as failing to show whether the defendant is charged under the first or second paragraph.—*State v. Sutton*, S. C. N. Car , May 22, 1888; 6 S. E. Rep. 687.

107. INTOXICATING LIQUORS—Local Option Law—Criminal Prosecution.—A complaint and information, under the Texas local option law, alleging an election thereunder to prohibit, not only the sale, but also the exchange of intoxicating liquors, is fatally defective.—*Ninenger v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 480.

108. INTOXICATING LIQUORS — Statute.—Construction of Indiana statutes, relative to the sale of intoxicating liquors and the liability of parties selling them with reference to persons known to be habitually intemperate.—*State v. Hudspathen*, S. C. Ind., March 6, 1888; 16 N. E. Rep. 518.

109. IRRIGATION—Bonds—Constitutional Law.—The act allowing irrigation districts to issue bonds to procure money to conduct necessary irrigating canals, and to levy assessments for their payment on the real estate of the district, is constitutional.—*Turlock I. D. v. Williams*, S. C. Cal., May 31, 1888; 18 Pac. Rep. 379.

110. JUDGMENT — Assignment — Garnishment. — A sheriff sued on his deputy's bond for fees collected by him belonging to the county. After judgment obtained the sheriff assigned the judgment to his creditors: *Held*, that a subsequent notice by the county to the bondsmen that the money in their hands belonging to the sheriff was attached cannot, in the absence of evidence of any fraud in the assignment, restrain the assignees from collecting the judgment.—*San Francisco v. McAllister*, S. C. Cal., May 22, 1888; 18 Pac. Rep. 315.

111. JUDGMENT—Default—Setting Aside.—A judgment by default against a plaintiff for failure to amend his complaint after obtaining leave to do so, will be reverse on appeal, when the complaint states a cause of action.—*Swain v. Burnette*, S. C. Cal , May 28, 1888; 18 Pac. Rep. 394.

112. JUDGMENT—Not on Merits—Res Adjudicata.—A petition after a trial by the court was dismissed, but no reason was given. On appeal this decison was affimed, because the petition did not state a cause of action: *Held*, no bar to another suit on the same cause of action.—*Pepper v. Donnelly*, Ky. Ct. App., May 15, 1888; 8 S. W. Rep. 441.

113. JUDGMENT—Vacation—New Trial.—Under Code Iowa, § 3154, a judgment by default will not be vacated at a subsequent term when defendant, knowing that the claim had been paid and there were receipts therefor, failed to make efforts to procure the same, or on the ground of surprise or misfortune, preventing him from making his defense, when he failed to apply to his codefendant for the proper information, or on account of false testimony, when he knew in advance that testimony of that character would be resorted to.—*Heathcote v. Haskins*, S. C. Iowa, May 29, 1888; 38 N. W. Rep. 417.

114. JURISDICTION—Appeal—Patents.—In an action in the circuit court upon a contract of license to make a patented article, where defendant, admitting the contract, raises the issues, which the court determines, of infringement and validity of plaintiff's patent, an appeal to the supreme court will lie, under Rev. Stat. U. S. § 698, regardless of the amount in controversy.—*St. Paul P. W. v. Starling*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1327.

115. JURISDICTION—Federal—Suits by States — Penal Action.—A suit by Wisconsin against a foreign insurance company, under Wisconsin law, imposing a penalty for doing business in the State without having made certain returns of its property and business to the State, is a penal action, and the supreme court has no original jurisdiction of such suit.—*Wisconsin v. Pelican I. Co.*, U. S. S C., May 14, 1888; 8 S. C. Rep. 1370.

116. JURISDICTION—Justice—Presumption. — Where, upon an appeal from a justice of the peace, his jurisdiction is called into question, and no copy of the transcript is exhibited, the supreme court will presume that the plaintiff's demand was within the justice's jurisdiction.—*Wise v. Allen*, S. C. Penn., April 23, 1888; 15 Atl. Rep. 544.

117. JURISDICTION—Trusts — Land Elsewhere. — A bill was filed in Tennessee by a landlord against his tenant of land in Arkansas, which defendant had purchased at a judicial sale, to establish a trust in his favor on the ground that a tenant could not purchase his landlord's property at such sale: *Held*, that the court had no jurisdiction.—*Pickett v. Ferguson*, S. C. Tenn., May 19, 1888; 8 S. W. Rep. 386.

118. JUSTICE OF THE PEACE—Supersedeas—Creditor.—After a justice has issued a *supersedeas*, staying an execution against property claimed as exempt, he has no power to recall it, and the execution plaintiff, if aggrieved, must appeal to the circuit court.—*Cox v. Lee*, S. C. Ark., May 19, 1888; 8 S. W. Rep. 400.

119. LEASE—Parol — Receipt. — Where defendant held a parol lease for ten years, and paid one year's rent, the evidence was conflicting whether a receipt given upon the payment of a second year's rent created a new lease for only one year, or merely affirmed the ten year's contract, was held to be a question of fact properly submitted to the jury.—*Rothermel v. Dunn*, S. C. Penn., April 16, 1888; 13 Atl. Rep. 509.

120. LIBEL AND SLANDER—Malice—Evidence.—It is competent in an action for slander to prove a repetition of the slanderous words, in order to show malice, without pleading the repetition.—*Haely v. Gregg*, S. C. Iowa, May 29, 1888; 38 N. W. Rep. 416.

121. LIMITATIONS—Personal Representative—Survival.—The provisions of Code N. C. § 164, extend to a case where an executor is removed and an administrator *de bonis non* is appointed.—*Smith v. Brown*, S. C. N. Car., May 19, 1888; 6 S. E. Rep. 667.

122. MARITIME LIENS — Repairs — Authority to Contract.—A authorized B to sell his yacht, and B employed C to do so. A revoked B's authority and sold the yacht to D. B and C, when their authority was revoked, were negotiating with E, and thereafter came to a verbal agreement with him for a sale, after which C, at E's request, employed the libelant to do repairs on the yacht. D stopped the work: *Held*, that libelant could not claim a lien on the vessel.—*The Sea Witch*, U. S. D. C. (N. Y.), March 22, 1888; 34 Fed. Rep. 654.

123. MASTER AND SERVANT—Defective Machinery.—A hammer used for driving spikes into cross-ties on a railroad is not machinery, within the Alabama law, making a master liable for injuries sustained by his employee from defective machinery.—*Georgia, etc. R. Co. v. Brooks*, S. C. Ala., May 29, 1888; 4 South. Rep. 289.

124. MASTER AND SERVANT—Risks of Employment—Minor.—A minor was injured in transferring lumber from one car to another, which work both he and his father had done before: *Held*, that the employer was not liable for not specifically warning the minor in advance of the danger.—*East & W. R. Co. v. Sims*, S. C. Ga., May 14, 1888; 6 S. E. Rep. 595.

125. MECHANIC'S LIEN.—Where mechanics or material men execute an instrument by which they release all liens which they have or may have on a particular building, such release includes liens for work done after as well as before its execution.—*Brown v. Williams*, S. C. Penn., April 16, 1888; 13 Atl. Rep. 519.

126. MECHANIC'S LIEN — Notice. — Under the mechanic's lien law of New Jersey, when notice is given by a contractor to the party responsible of the lien and of the amount, he must hold that sum in readiness to

answer the demand of the contractor.—*Mayer v. Mutchler*, N. J. Ct. Err. & App., April 17, 1888; 13 Atl. Rep. 620.

127. MORTGAGE—Absolute Deed — Construction. —— Under the evidence, it was held that the absolute deed in the case should not be declared a mortgage.—*Kraus v. Dreher*, S. C. Ala., May 29, 1888; 4 South. Rep. 287.

128. MORTGAGE — Building — Removal. —— Where a mortgagor, without the knowledge and consent of the mortgagee, removes a building from the mortgaged premises to another lot, and then sells that lot to one having notice of the mortgage, the building is liable in the hands of such purchaser for the payment of the mortgage.—*Betz v. Muench*, N. J. Ct. Chan., April 23, 1888; 13 Atl. Rep. 622.

129. MORTGAGE—Conditional Sale—Real Estate.——A sold B real estate situate in Louisiana, in payment of a debt due B, provided that if A paid B the debt by a certain time the deed should be void: *Held*, that it was a common law mortgage, and did not pass the title to the property.—*Howe v. Austin*, S. C. La., March 26, 1888; 4 South. Rep. 315.

130. MORTGAGE—Foreclosure — Interest. —— If, in a mortgage, there is no provision that, upon default of payment of interest, the principal shall become due, only such part of the mortgaged premises as may be necessary to pay the interest and costs will be sold upon default of payment of interest.—*Probasco v. Vanneppes*, N. J. Ct. Chan., March 29, 1888; 13 Atl. Rep. 598.

131. MORTGAGE—Paying Taxes—Constitutional Law.—A clause in a mortgage that the mortgagee may pay the taxes accruing on the property, and add such payments with interest thereon to the mortgage debt, does not, under the California constitution, render an agreement in the note secured to pay interest monthly at nine per cent. in advance null and void, and default in payment being made, the right to foreclose accrued before the time at which the note was made payable, as provided in the mortgage.—*Maiye v. Hart*, S. C. Cal., May 26, 1888; 18 Pac. Rep. 325.

132. MUNICIPAL CORPORATIONS — Control of Streets—Delegation of Authority.——Where a city is authorized to contract for street railroads and to give the exclusive privilege of using the streets in that manner, the actual use therefor confers the privilege, and the exclusive right begins when the use begins, and the city cannot delegate to any contractor the right to determine when and on what street the public convenience requires a line of road.—*Citizens' S. R. Co. v. Jones*, U. S. C. C. (Ark.), March 15, 1888; 34 Fed. Rep. 579.

133. MUNICIPAL CORPORATIONS — Irrigation — Negligence.——The care required of a city which undertakes to supply water to residents for irrigation, using the street gutters therefor, is such as a man of average prudence and intelligence would employ under like circumstances.—*City of Boulder v. Fowler*, S. C. Colo., June 1, 1888; 18 Pac. Rep. 337.

134. MUNICIPAL CORPORATIONS—Paving Streets—Hearing.——Where a city charter provides that applications for improving a street shall be published, and thereafter the council shall hear the objections urged and decide, and that when an ordinance providing for such improvement declares that the requirements as to petition and notice have been complied with, such declaration shall be conclusive for all purposes. If the city council refuse such hearing the execution of the ordinance will be restrained until such hearing is had.—*Dennison v. City of Kansas*, S. C. Mo., June 4, 1888; 8 S. W. Rep. 429.

135. MUNICIPAL CORPORATIONS—Street—Scire Facias.—It is no defense to a *scire facias* against a property owner that the water pipes laid in front of his property were old and imperfect, it being the duty of the city to repair them, and not his.—*Swain v. City of Philadelphia*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 545.

136. MUNICIPAL CORPORATIONS—Street Improvements—Assessments.——Under California law, where work is done on portions only of each side of the center line of of a street in San Francisco, all the property on each side for the whole length of the district ordered to be improved should be assessed with the whole expense incurred on the side on which the property fronts.—*Diggins v. Brown*, S. C. Cal., May 29, 1888; 18 Pac. Rep. 373.

137. MUNICIPAL CORPORATIONS— Town Marshal.—— Under Kentucky laws, a marshal of Campbellsville, who has simply given bond in the county court to the comonwealth, is not entitled to a copy of the assessment book, and a warrant authorizing him to collect the town taxes until he has executed a further bond as such collector.—*Board of Trustees v. Borders*, Ky. Ct. App., May 17, 1888; 8 S. W. Rep. 446.

138. NAVIGABLE WATERS—Railroad—Bridge — Statute. ——A complaint that the master of a vessel demanded of a keeper of a draw-bridge over navigable waters, that he should open the draw in which the vessel had been caught in passing is bad on demurrer, because it does not state that the demand was made when the draw could be lawfully opened. — *Jennings v. Fitchburg, etc. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 468.

139. NEGLIGENCE — Contributory — Failure to Stop Train. —— When defendant's agents failed to stop the train long enough to allow plaintiff to get off safely, and he jumped off after the train started and was injured, it is for the jury to decide whether under the circumstances he was guilty of negligence. — *Covington v. Western & A. R. R.*, S. C. Ga., May 11, 1888; 6 S. E. Rep. 593.

140. NEGLIGENCE — Contributory — Proximate Cause. —— Where the driver of a street car saw the peril of plaintiff in time to have prevented the injury by reasonable care, the company will be held liable therefor, though the injured party was in the first instance guilty of contributory negligence.— *Hays v. Gainsville S. R. R.*, S. C. Tex. May 1, 1888; 8 S. W. Rep. 491.

141. NEGLIGENCE— Contributory — Railroad Crossing. ——Deceased saw the train coming, but whipped up his horses to get over the crossing before it arrived and was killed in the attempt: *Held*, that he was guilty of contributory negligence. — *International, etc. R. R. v. Kuehn*, S. C. Tex., May 1, 1888; 8 S. W. Rep. 484.

142.—NEGLIGENCE—Contributory Negligence.——Circumstances stated under which an engineer who run his train over a switch in a fog at the rate of fifteen miles an hour, and was injured by collision with another train, was held to be guilty of contributory negligence. —*Wert v. Heim*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 548.

143. NEGLIGENCE—Railroad Crossings—Damages.—— Where a person crossing a railroad track on a street in a village on a dark night was struck by a train, which was running down grade, the engineer not being on the look-out, a judgment for punitive damages should be reversed, a case of ordinary negligence only being established. — *Louisville, etc. R. R. v. Roberts*, Ky. Ct. App., May 24, 1888; 8 S. W. Rep. 459.

144. NEGOTIABLE INSTRUMENT — Set Off. —— Where the holder of a promissory note has acquired it for value the maker cannot plead as a set-off a note acquired after the assignment for a merely nominal consideration.—*Proctor v. Cole*, S. C. Ind., May 28, 1888; 17 N. E. Rep. 189.

145. NEW TRIAL—Judgment—Vacating — Statute.—— Construction of Indiana statute authorizing a judgment to be vacated and a new trial granted within one year after the rendition of the judgment. This statute does not mean that the case shall be tried within one year but that the application shall be made within that period.—*Rodman v. Reynolds*, S. C. Ind., March 8, 1888; 16 N. E. Rep. 516.

146. NOVATION — Assuming Payment of Purchase Money.——A purchased land from B, who resold it to C, who assumed the payment of the purchase money and gave his note therefore to C: *Held*, that C could not plead payments by B on account and that therefor his note made thereafter was usurious.—*Keller v. Beaty*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 598.

147. NUISANCE—Injunction.—— Circumstances stated

under which it was held that a school for metal-work and wood-carving carried on in a building situated among private houses, was a nuisance by reason of its noise, and that it would be restrained by injunction. — *Appeal of Ladies', etc. Co.*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 537.

148. OFFICE— Acts After Expiration of Term. —— An appointment to fill a vacancy in the office of county treasurer, made by the vote of a county commissioner whose term expired at midnight the night before, is invalid — *People v. Reid*, S. C. Colo., May 4, 1888; 18 Pac. Rep. 341.

149. PARTITION—Heirs—Jurisdiction.——Under Texas law, until the administration of an estate is closed, the county court has exclusive jurisdiction to decree partition of its lands among the heirs, when the title is clear as among them and there are no adverse claims by third persons.—*Branch v. Hanrick*, S. C. Tex., May 15, 1888; 8 S. W. Rep. 539.

150. PARTITION—Lease.—— Where upon a bill of partition it appears that a lease exists upon such property but that the validity of the lease is contested, it is proper that action upon the bill should be deferred for reasonable time, so that the contest may be settled. —*Brendel v. Klopp*, Ind. Ct. App., April 12, 1888; 13 Atl. Rep. 589.

151. PARTITION — Sale —— It is not error for the orphan's court to refuse an offer by one of the parties to a partition to take the property at a specified price, such offer being made three hours before the time of sale, the offer comes too late.—*Appeal of Wistar*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 550.

152. PARTNERSHIP — Agreement among Corporations. ——An agreement among a number of corporations to select a committee composed of representatives from each corporation and to turn over their properties to such committee to be managed by them and to divide the profits in agreed proportions, and the arrangement to last a certain time is a contract of partnership. Such contracts made by corporations, created under the Tennessee law of 1875, are *ultra vires*. — *Mallony v. Hananer O. W.*, S. C. Tenn., May 8, 1888; 8 S. W. Rep. 396.

153. PARTNERSHIP—Partner Binding Firm. — A bought goods from B, agreeing in consideration thereof to pay B's note to C. A entered into partnership with D, and the firm agreed to pay the indebtedness incurred in purchasing the goods. During the existence of the firm one of the partners executed a firm note as security for the payment of B's note: *Held*, that the firm was liable on such note.—*Randall v. Hunter*, S. C. Cal., May 23, 1888; 18 Pac. Rep. 317.

154. PATENTS FOR INVENTIONS — Lifting Jacks. —— Patent 154,989 to Jacob O. Joyce for lifting jacks is not infringed by a lifting jack in which the pawl is pressed forward by means of a spring, notwithstanding the fact that such pawl moves on a plan slightly inclined to the ascending bar, but which is not so arranged that the pawl moves over it by the force of gravity. — *Joyce v. Chillicothe F. & M. Co.*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1311.

155. PLEADINGS—Account—Verification.—— A person who has verified a petition and the bill of particulars of his account, which has not been controverted by answer, need not make formal proof of the account before judgment can be rendered. — *Eaton v. Peavy*, S. C. Iowa, June 1, 1888; 38 N. W. Rep. 423.

156. PLEADING — Bill of Particulars. —— In an action for storage of an engine, a bill of particulars furnished, charging storage for one engine in a basement, is sufficient.—*Taylor v. Dexter, etc. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep 462.

157. PLEADING—Exhibit.—— Where a copy of a lease is referred to in a pleading and annexed to it, it becomes a pail of the record and *oyer* of it need not be prayed.—*Loch v. Barris*, S. C. N. J., March 19, 1888; 13 Atl. Rep. 602.

158. PLEADINGS—Set-off—Contract and Tort.——Damages arising from a tort cannot be set-off to a suit on a contract, under Georgia law. — *Green v. Combs*, S. C. Ga., May 11, 1888; 6 S. E. Rep. 582.

159. PRACTICE—Dismissal—Want of Prosecution.—— A case was tried before the court, who announced that his opinion was for the defendant, but notice of decision was not given, or findings of facts filed or waived. Plaintiff appealed to the clerk to enter judnment, who refused. He then moved for a new trial, which was refused. He then moved to place the case on the calendar for trial, when defendant moved to dismiss for want of prosecution: *Held*, not a proper case for dismissal. —*Pardy v. Montgomery*, S. C. Cal., May 25, 1888; 18 Pac. Rep. 330.

160. PRACTICE—New Trial— Weight of Evidence. —— When the verdict is against the weight of the evidence, which is conflicting, the court properly grants a new trial. — *Creel v. Bush*, S. C. Ga., May 1888; 6 S. E. Rep. 598.

161. PRINCIPAL AND AGENT— Authority—Physician.—— A sent B to obtain Dr. C. to attend to his sick wife. Dr. C not being obtainable, B engaged Dr. D. When Dr. D arrived, A told him the trouble was over, and his services were not needed: *Held*, that under the evidence the suit of D against A for his medical services should not have been taken from the jury.— *Bartlett v. Sparkman*, S. C. Mo., May 21, 1888; 8 S. W. Rep. 406.

162. PRINCIPAL AND AGENT—Deed — Ratification. —— When a conveyance is made by one acting under an alleged power of attorney, a subsequent conveyance by the owner to the same grantee for one dollar must be presumed to be a ratification of the act of the alleged attorney, though it does not so state. — *Talbert v. Dull*, S. C. Tex. May 8, 1888; 8 S. W. Rep. 530.

163. PRINCIPAL AND AGENT— Scope of Authority—Husband and Wife. —— Evidence that a wife placed her husband in apparent charge and control of her grocery store does not show authority in the husband to employ another to sell out the entire business in one transaction.—*Vescelius v. Martin*, S. C. Colo., June 1, 1888; 18 Pac. Rep. 338.

164. PRINCIPAL AND SURETY—Proof — Judgment. —— After suit and judgment against two, it is too late for one of the defendants to set up that he was surety for the other in the contract sued on, under Code N. C. § 2100. — *Gatewood v. Leak*, S. C. N. Car. May 18, 1888; 6 S. E. Rep. 635.

165. POWERS—Trust.—— Where powers are given by an instrument which specifies certain qualifications of the trustee,no one else but he can exercise those powers. —*Drummond, etc. Co. v. Jones*, N. J. Ct. Chan. April 10, 1888; 13 Atl. Rep. 611.

166. QUIETING TITLE — Statute. —— Construction o statute of New Jersey relative to quieting titles; under that statute it is necessary that the party availing himself of it shall have actual possession of the premises in question; constructive possession is not sufficient. — *Shepherd v. Nixod*, Ct. E. and App. N. J. March 30, 1888; 14 Atl. Rep. 617.

167. RAILROADS—Contracts with Employees — Regulation.——A stock agent of a railroad, incorporated in Missouri, leased its stock yards, and agreed to load and unload stock on and from its cars and to furnish forage, which he was to charge against and collect from shippers. Missouri law forbids a railroad employee from being interested in any way in its business: *Held*, that the contract was void under the law of the State creating the corporation, and that it could not be ratified.—*Rue v. Missouri P. R. Co.*, S. C. Tex., May 15, 1888; 8 S. W. Rep. 533.

168. RAILROAD—Crossing—Statute. —— Construction of Ohio statute relative to railroads crossing each other and expense of keeping such crossing in repair. Ruling as to liability of the lessee of such a railroad.— *Baltimore, etc. Co. v. Walker*, S. C. Ohio, March 13, 1888; 16 N. E. Rep. 475.

169. RAILROADS—Foreclosure — Reorganization. —— Case construing agreement under which a railroad was purchased on foreclosure by the bondholders and re-

organized.—*Mackintosh v. Flint, etc. R. Co.*, U. S. C. C. (Mich.), March 22, 1888; 34 Fed. Rep. 582.

170. RAILROADS—Sale Subject to Prior Lien.——When a railroad is sold under a decree of court, reserving the rights of a prior lien holder, and the purchaser fails to satisfy said lien, the court having reserved the right to make further orders, the court should order a resale to satisfy said claim, without setting aside the former sale and confirmation.—*Farmers', etc. Co. v. Newman*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1364.

171. RECORDS—Correction—When Made.——A court may correct its records after final decree and after an appeal has been taken at any time before final decree in the appellate court.—*Ex parte Henderson*, S. C. Ala., May 28, 1888; 4 South. Rep. 284.

172. REMOVAL OF CAUSES—Acts of State Court—Corporations.——When an action is removable, and the required petition and bond have been filed in the State court, no action of the State court can prevent the jurisdiction of the federal court. A foreign corporation sued in a State court by a citizen of the State has the right of removal.—*Wilson v. Western, etc. Co.*, U. S. C. C. (Cal.), March 19, 1888; 34 Fed. Rep. 561.

173. REPLEVIN—Justice of the Peace—Jurisdiction.—In a replevin suit before a justice of the peace in Tennessee, when the plaintiff refuses to deliver up the property to the defendant to whom it has been adjudged, the justice may render judgment against the plaintiff for the value of the property as established in any amount not exceeding $1,000, where plaintiff in his affidavit for the writ has laid the value of the property at $500 and defendant claims judgment only for such actual value of the property.—*Godsey v. Weatherford*, S. C. Tenn., May 24, 1888; 8 S. W. Rep. 385.

174. REPLEVIN—Rescission of Sale — Tender. —— M bought goods of A on false representations as to his solvency, and, having disposed of $900 worth of them, transferred his whole stock to B in payment of prior debts. A tendered the $400 paid by M on account to M and to B, brought replevin against both and tendered the sum in court: *Held*, B not being a *bona fide* purchaser against A, that A was entitled to said sum in part payment of the $900 worth of goods disposed of by M.—*Crane, etc. Co. v. Trentman*, U. S. C. C. (Ind.), March 29, 1888; 34 Fed. Rep. 620.

175. SALE—Change of Possession — Evidence.—— In an action by the purchaser of a boiler against a sheriff, seizing the same under an attachment against the vendor, there was evidence to show that the vendee, under whom plaintiff claimed, had the keys of and full access to the building where the boiler was, as an employee of the vendor at and prior to the sale to him, and had never removed the boiler nor exercised any act of ownership over it, except to make the sale to plaintiff: *Held*, that there was not such a delivery, followed by actual and continued possession, as is required by California law.—*Joshua H. M. W. v. Connolly*, S. C. Cal., May 28, 1888; 18 Pac. Rep. 327.

176. SALE—Contract—Condition Subsequent.——Circumstances stated under which a sale of standing and fallen timber on a tract of land at a given price, the quantity to be subsequently ascertained, was an absolute sale, and not dependent upon the subsequent condition.—*Gatzmer v. Moyer*, S. C. Penn., April 23, 1888; 13 Atl. Rep. 540.

177. SALE—Delivery—Replevin. —— To pass title to personal property, as against an attaching creditor of the vendor, there must be a delivery, actual or constructive. Without it the vendee cannot maintain replevin.—*McNaughton v. Leonard*, S. J. C. Me., Feb. 9, 1888; 13 Atl. Rep. 584.

178. SALE—What Constitutes.——If the assignee of a note and mortgage takes the mortgaged goods, independent of the mortgage, in part payment of the note, and it is agreed that whatever is collected from the goods shall be applied to the note, there is a sale of the goods.—*Phifer v. Erwin*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 672.

179. SCHOOLS—Bonds—Apportionment — Injunction.—One not a colored person cannot maintain an injunction against a town to prevent the sale of bonds for building school houses for white and colored people, under act Ga., Oct. 24, 1887, on the ground that the act discriminates against the colored people and is unconstitutional, since he has no personal interest in obtaining the injunction.—*Reid v. Town of Eatonton*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 602.

180. SCHOOLS—School Trustee—Township. —— Construction of Indiana statutes relative to schools and school districts, the power of trustees and the liability of townships for their contracts.—*Boyd v. Mill Creek, etc. Co.*, S. C. Ind., March 28, 1888; 16 N. E. Rep. 511.

181. SHIPPING—Working Hours — Custom. —— The phrase "working hours" in a charter party means those hours during which work is ordinarily done about the business to which the clause relates, and is to be construed according to the custom of the port.—*The Principia*, U. S. D. C. (N. Y.), March 28, 1888; 34 Fed. Rep. 667.

182. SPECIFIC PERFORMANCE — Acceptance of Offer—Reasonable Time.——In this case specific performance was decreed, plaintiff having accepted the offer of sale in a reasonable time, the matter being arranged by correspondence.—*Phillips v. Deck*, S. C. Cal., June 1, 1888; 18 Pac. Rep. 336.

183. SPECIFIC PERFORMANCE — In Part.—— When a party cannot fully perform a contract for exchange of lands, the other party may sue for specific performance in part and for compensation for the residue.—*Swain v. Burnette*, S. C. Cal., May 28, 1888; 18 Pac. Rep. 394.

184. SPECIFIC PERFORMANCE—Marriage Contract.—— Evidence establishing at most an honest belief and expectation by a wife and her mother before and at the time of the marriage, that at some time during after marriage the husband would provide the wife with a home out of the proceeds of the sale of certain property, will not justify a court in finding an agreement in consideration of marriage to settle on her that property, or property purchased with the proceeds of its sale.—*Nickerson v. Nickerson*, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1355.

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